

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

September 17, 2008

4:28 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

1 HEARING re Debtor's Motion Pursuant to Section 1015(b) of the
2 Federal Rules of Bankruptcy Procedure Requesting Joint
3 Administration of Chapter 11 Cases

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5 HEARING re Motion for an Order Pursuant to Section 105(a) of
6 the Bankruptcy Code Directing that Certain Orders in the
7 Chapter 11 Case of Lehman Brothers Holdings Inc. be Made
8 Applicable to LB 745 LLC

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10 HEARING re Debtor's Motion Pursuant to Section 105(a) of the
11 Bankruptcy Code and Bankruptcy Rule 1015(c) and 9007 Seeking
12 Authority to Implement Certain Notice and Case Management
13 Procedures

14
15 HEARING re Debtor's Motion to (a) Schedule a Sale Hearing; (b)
16 Establish Sales Procedures; (c) Approve a Breakup Fee; and (d)
17 Approve the Sale of the Purchased Assets and the Assumption and
18 Assignment of Contracts Relating to the Purchased Assets

19
20 HEARING re Motion for Order (i) Authorizing Debtor to Obtain
21 Post-Petition Financing Pursuant to Sections 363 and 364 of
22 Bankruptcy Code; (ii) Granting Liens and Superpriority Claims
23 to Post-Petition Lenders Pursuant to Section 364 of Bankruptcy
24 Code; and (iii) Scheduling Final Hearing

25 Transcribed by: Lisa Bar-Leib

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P R O C E E D I N G S

THE COURT: Please be seated those who have seats.

I'd like to make an announcement which is totally unrelated to the substance of the hearing. It's related to our sound system. We discovered during yesterday's hearing and discovered again during the hearing that I had this afternoon in another case at 2:00 that the sound system is being adversely affected by BlackBerry use or other electronic devices. If you have one, even if you're not close to the podium, please shut it off. It's like you're on an airplane. Thank you.

MR. MILLER: Good afternoon, Your Honor. Harvey Miller from Weil Gotshal & Manges on behalf of the debtors in the two Chapter 11 cases of Lehman Brothers Holdings Inc. and LB 745 LCC. First, Your Honor, let me express the appreciation of the debtors and its professionals for all of your tolerance in accommodating all of our starts and stops over the last two days. This has been a very, very unique case in many, many respects, Your Honor.

Many years ago, John Greenleaf Whittier said "For of all sad words of tongue or pen, the saddest are those 'it might have been'." It's hard to find a place to begin to describe the events of the past week. There are lots of things that might have been but did not occur, Your Honor. If somebody would have said last Wednesday evening that -- it would have

1 been incomprehensible, Your Honor, to believe that an
2 organization that has been in existence for 158 years and has
3 become a worldwide leader in the financial community with over
4 25,000 employees would basically close its doors four days
5 later. The consequences of the economic and financial
6 conditions that all thought were contained in 2007 are a direct
7 cause of what has happened to Lehman Brothers, Your Honor.

8 For months, the company has been pursuing strategic
9 alternatives. The objective has been to protect the public
10 customers, preserve values and assist in avoiding the
11 deterioration of the financial markets. The parties to a
12 proposal which we think, Your Honor, will accomplish that
13 objective are the two debtors and the broker dealer subsidiary
14 Lehman Brothers Inc., Your Honor. And I might say, Your Honor,
15 there are 630,000 accounts having a value of 138 billion
16 dollars that are dependent upon the consummation of a
17 transaction which will allow this business to continue albeit
18 under the auspices of another entity. And since last Thursday
19 night, Your Honor, people have been working around the clock in
20 a Herculean effort to try and accomplish a transaction which
21 would protect the public interest, stabilize the public markets
22 and offer some assurance to employees. And I think, Your
23 Honor, if Your Honor had passed the Lehman Brothers building
24 last Thursday night -- or last Friday night, I should say, Your
25 Honor, and Saturday and watch the employees filling up their

1 suitcases and taking their personal belongings out of the
2 building, you would have seen the traumatic effect of what has
3 happened here, Your Honor.

4 So the question was how to save the value of the
5 franchise, protect the public customers and interest and
6 employees. The result, Your Honor, is a complex transaction
7 with many moving parts, some parts that are still moving every
8 single hour, Your Honor. Essentially, it provides for a sale
9 of the assets of the broker dealer, which I'll refer to, Your
10 Honor, as LBI. And that is the North American investment
11 banking and capital markets operation and supporting
12 infrastructure. It involves the two Chapter 11 debtors because
13 there are what I call related assets that provide the
14 infrastructure for the broker dealer. And the second debtor is
15 critical to the transaction because if the transaction, Your
16 Honor, is consummated, the purchaser will be buying that
17 building or the interest that the debtors have in that building
18 because there'll be a great need for space. The transaction
19 would allow the clearing of the moving of the accounts. It
20 would protect the public customers. And I have to say, Your
21 Honor, if the transaction is not consummated the notional cost
22 in connection with the transaction will be in the trillions.

23 The transaction, Your Honor, has been structured
24 because of the needs of the purchaser given the circumstances
25 in which the debtors find themselves and in which the broker

1 dealer finds itself. It is absolutely essential, Your Honor,
2 that the purchaser have the protections of Section 363 of the
3 Bankruptcy Code. The transaction, Your Honor, would
4 contemplate providing continued employment for almost 10 to
5 12,000 employees as part of this transaction for some period of
6 time. Some employees will be continued for much longer periods
7 of time but it will allow a transition, Your Honor.

8 So, how was the transaction structured? It was
9 structured, Your Honor, so that the two debtors would be
10 selling certain assets pursuant to Section 363 and in
11 connection with the broker dealer, Your Honor, in a very
12 unique -- and I don't think I've ever seen it done before.
13 There would be at a point in time, as the transaction moves
14 forward to conclusion, the commencement of a proceeding under
15 the Securities Investor Protection Act. And a designated
16 trustee would be appointed immediately and there would be, in
17 effect, Your Honor, concurrent hearings before Your Honor, I
18 believe, both in the SIPC proceeding and in the Chapter 11
19 cases for approval of the sale. In effect, we have used the
20 expression, Your Honor, of forward the pre-pack SIPC
21 proceedings. And I have to inform Your Honor that what has
22 gone on in the last four or five days -- it seems like one long
23 day -- is complete cooperation with the regulators, the
24 Securities and Exchange Commission, the Federal Reserve Bank
25 and the Securities Investor Protection Corporation, to agree on

1 a format which would accomplish the purpose of preserving all
2 these interests. And why is that so important, Your Honor? I
3 hate to use the analogy of a melting ice cube. It's been used
4 too often. So I'm just going to say this is a wasting asset.
5 It is extremely fragile and sensitive. And it's because of
6 that that people have been working around the clock. And it is
7 because of that, Your Honor, that the time, and we recognize
8 the time element is so tight that we are basically asking Your
9 Honor to set a -- sign a -- enter a sales procedure order which
10 will set up a hearing on late Friday afternoon. And the
11 coordination to get the time for the hearing on Friday
12 afternoon is very complex because it has to resonate with the
13 regulators. It has to be sufficient to allow the transfer of
14 all these accounts at the close of the market. And this
15 includes not only securities accounts, Your Honor, but
16 commodities futures accounts which is a very complex area.

17 It is a very complex transaction. As Your Honor
18 knows, the papers weren't filed till 6 a.m. this morning. The
19 negotiations -- and I want to tell you negotiations, Your
20 Honor, never stopped. People never went to sleep to get this
21 transaction. And why did they do that? Because of the
22 sensitivity of this transaction. And, Your Honor, just the
23 delay from yesterday, when Your Honor was kind enough to give
24 us a hearing date yesterday, to today has had negative
25 inferences by a great many people. Is there ever going to be a

1 hearing on this? That's why, Your Honor, we have come forward
2 today. We want to go forward. And I would point out, Your
3 Honor, we are not asking for any real substantive relief today
4 with respect to the sale motion. We are asking Your Honor to
5 set a hearing for Friday afternoon. And the only sensitive --
6 I'll call it somewhat sensitive issue is the approval of the
7 breakup fee.

8 Now, Your Honor, we are talking about a transaction
9 that has, as I said, many, many parts. But looking at it from
10 the net of this transaction, there will be approximately
11 1,700,000,000 dollars yielded out of this transaction.

12 UNIDENTIFIED SPEAKER: A billion.

13 MR. MILLER: I'm sorry?

14 UNIDENTIFIED SPEAKER: A billion.

15 MR. MILLER: You know, I always think of Senator
16 Dirksen, Your Honor. He said a billion here and a billion
17 there. Pretty soon you're talking about real money.

18 THE COURT: Well, you're talking about real money
19 here.

20 MR. MILLER: Absolutely, Your Honor. And so we have
21 1,700,000,000 dollars. There has been an enormous effort put
22 into this by the prospective purchaser, Barclays Capital, Your
23 Honor. And in the negotiations, quite properly, with all of
24 the efforts that they have put into it, there was a request --
25 I should say a request, almost a demand, for a breakup fee.

1 And there were negotiations in respect of that amount. And
2 what it came out to be, Your Honor, was a proposed breakup fee
3 of a hundred million dollars plus reimbursement of expenses of
4 up to twenty-five million dollars.

5 THE COURT: May I ask you a question --

6 MR. MILLER: Yes, sir.

7 THE COURT: -- about how to equate that breakup fee
8 and expense reimbursement with the purchase price? And I've
9 attempted to assess the notional value of the transaction
10 because in addition to the 1.7 billion dollars, there's a
11 reference to 1.5 billion dollars in cure amounts and possibly
12 as much as 2.5 billion dollars in certain employee related --

13 MR. MILLER: Yes, sir.

14 THE COURT: -- severance expenses which may or may
15 not be triggered. For purposes of my evaluating the fairness
16 of the overall proposed breakup fee and expense reimbursement
17 as a percentage of the transaction, not that I need to do that
18 but frequently Courts are viewed as approving breakup fees
19 within a certain market range. How should I view the fair
20 value of the overall transaction?

21 MR. MILLER: I think, Your Honor, if you start with
22 the billion seven hundred million dollars, which is the cash
23 component, as Your Honor obviously read in the papers, there
24 will be an exposure for 2.5 billion dollars in connection with
25 the retention of these 10 to 12,000 employees.

1 In addition to that, Your Honor, in connection with
2 the assumption and assignment of contracts, the cure amounts
3 and other payments in connection with the contracts, are
4 estimated to be a billion five hundred million dollars. So we
5 have four billion dollars right there, Your Honor.

6 In addition, Your Honor, the purchaser is paying 250
7 million dollars for the goodwill of LBI. So there you have
8 4,250,000,000 dollars in that respect, Your Honor.

9 And then, Your Honor, in the interim, LBI has entered
10 into an arrangement with the prospective purchaser where
11 there's a repo agreement in which they are backing up and
12 allowing these repos to be settled and to be financed. In
13 addition, if this goes forward, there will be a support
14 agreement for this interim period of two or three days where
15 Barclays Capital will be on premises, will be offering
16 oversight and in the sole discretion, may be willing to advance
17 some monies in the interim period.

18 So the problem we had, Your Honor, there are so many
19 different elements in this transaction that to do the usual
20 calculation of whether it should be two percent, three percent,
21 etcetera, became enormously complex during the course of the
22 proceedings. As Your Honor knows, as these transactions go up
23 in value, very often the breakup fee goes up in value. And
24 this -- if Your Honor just took the 1.7, I would say to Your
25 Honor, it's above three percent, clearly above three percent.

1 THE COURT: I know. I did the calculation.

2 MR. MILLER: Yes, Your Honor. But this is -- again,
3 I have to use the expression, this is such a unique
4 transaction. And there's been so much effort and there is so
5 much exposure. Senior executives at Barclays likewise, like
6 the rest of us slaves, never went to sleep from Sunday right
7 through last night.

8 So, I think, Your Honor, there's an extra quota of
9 consideration that has to be given in connection with this
10 transaction. And I would also bear in mind, Your Honor, that
11 what are the prospects of a competitive bid. This is such a
12 fragile asset. And it is not an asset that people did not know
13 was for sale. For months now, Lehman Brothers has been
14 pursuing strategic alternatives. The market has known that
15 aspects of Lehman, or even all of Lehman, were available for
16 purchase or investment. So that -- I'm not going to call it
17 shopworn Your Honor, but that the public, the financial
18 markets knew that these assets were for sale. And we had a
19 benefit, Your Honor. We were lucky because Barclays had been
20 negotiating to acquire Lehman. Unfortunately, that was one of
21 the things that might have been but never turned into fruition.
22 But as the part of that process, at least they had some
23 familiarity. And that was not a long negotiation either, Your
24 Honor. It was two days, basically. Unfortunately, because of
25 various regulations in the UK, that transaction could not have

1 gone forward. So we start at least with somebody who had some
2 knowledge. Otherwise, Your Honor, this wasting asset might
3 have been wasted. And unfortunately, Your Honor, and I'm not
4 trying to do the sale hearing now -- in court with us is Mr.
5 McDade, Herbert McDade, who is the president and chief
6 operating officer who, if he had to testify, Your Honor, would
7 testify that if this transaction is not approved, Friday night
8 there will be nobody in the building. And it will just
9 disappear.

10 So, I want to repeat, Your Honor. We're not asking
11 for a ruling on the sale today, Your Honor.

12 THE COURT: Well, let me just deal procedurally with
13 what's before me. And I know that you're in effect starting
14 with the sale procedures motion.

15 MR. MILLER: Yes, sir.

16 THE COURT: I was in early this morning and those
17 papers didn't make it to the ECF system until sometime after
18 7:30 --

19 MR. MILLER: Yes.

20 THE COURT: -- I didn't see them until about then.
21 And knowing the way those lawyers who don't work all night
22 behave, they often don't get to their offices until sometime
23 later than that. I have some concerns which I would like you
24 to address on the record. Recognizing that this is an
25 absolutely extraordinary transaction with extraordinary

1 importance to the capital markets globally, I still need to
2 deal with fundamental due process issues.

3 MR. MILLER: Yes, sir.

4 THE COURT: And I would like you to comment -- and
5 I'm not inviting objections on this basis. I'm just saying I
6 have a concern as to the adequacy of notice as to the substance
7 of the transaction for purposes of basic constitutional due
8 process.

9 MR. MILLER: Yes, sir.

10 MR. DESPINS: Your Honor, I'm sorry to interrupt. I
11 never do that but I thought that Mr. Miller was making
12 introductory remarks and therefore I wanted him to finish. But
13 on this issue, Your Honor -- first of all, let me introduce
14 myself. Luc Despins with my partner, Dennis Dunne, from
15 Milbank Tweed, proposed counsel for the official creditors'
16 committee.

17 THE COURT: That's okay. Debtors' counsel is
18 proposed counsel, too.

19 MR. DESPINS: Your Honor, we -- the committee has
20 concerns regarding -- I want to make sure the Court hears us on
21 that request. Clearly, we're not going to have a prolonged
22 argument over this but we request, and the committee wanted us
23 to request, a short adjournment until tomorrow morning so that
24 we can actually get up to speed and have an informed discussion
25 or -- or maybe not because maybe this is all -- maybe

1 everything that's going to be approved by the Court is
2 perfectly appropriate. But we want a short adjournment until
3 tomorrow morning. We were retained no more than forty minutes
4 ago, Your Honor. And this -- through no fault of the debtor.
5 This has nothing to do and we're not faulting the debtor in any
6 way. It's just that -- happened that way. But it's also
7 outside of our control.

8 So perhaps, in that context, Mr. Miller could, while
9 addressing your remarks, also address our request for a short
10 adjournment until your earliest convenience tomorrow, Your
11 Honor.

12 THE COURT: Okay. I'm sure he'll do that. But my
13 introduction to Mr. Miller was less about whether this hearing
14 should be held at another time and more about dealing with the
15 timing imperatives that confront the Court. I think everybody
16 needs to understand that I am personally disposed to doing
17 everything within my power to accommodating this transaction
18 within the limits of the law, the procedural rules and
19 fundamental due process. And all I am asking Mr. Miller to
20 address right now is my ability within my discretion, which is
21 remarkably broad, particularly at a time like this, to do
22 something extraordinary.

23 MR. MILLER: Your Honor, we could not agree with you
24 more about it being extraordinary. And I want to assure Your
25 Honor that we were very cognizant of the due process arguments.

1 And if we had the luxury of an asset that would stay in place
2 or a group of assets that would stay in place and would still
3 be there two weeks from now, we clearly would have done the
4 normal process of getting a sale procedures order entered,
5 having a period of time for people to get -- do whatever due
6 diligence they wanted to do. Our problem, and what we have
7 discussed at length, Your Honor, could we possibly do that and
8 still have a transaction? Would the purchaser stand by during
9 that period? And what would happen during that period? The
10 consensus among all of the business people, Your Honor, and the
11 professionals was there would be nothing to sell in two weeks.
12 This is really and truly a wasting asset.

13 So what we have tried to do, Your Honor, and as I
14 have said to Mr. Despins, we will stay up all night with him
15 and explain this transaction. Again, the only issue that Your
16 Honor has to decide today which has any significance at all is
17 the breakup fee. I'm not talking about the DIP. And set the
18 hearing. I know Your Honor came in early because Your Honor
19 expected to find the motion papers here.

20 THE COURT: Actually, I expected to find those papers
21 last evening. But it's all right.

22 MR. MILLER: I have to tell Your Honor, modern
23 technology is not all that it's cracked up to be.

24 THE COURT: I know.

25 MR. MILLER: And trying to get some stuff through a

1 computer is not so easy and to a printer. And there was a lot
2 of frustration and a number of statements "Well, I'm about to
3 commit suicide" but we didn't let that happen.

4 So we took that into recognition, Your Honor. And we
5 have sent them their websites. We have given as much publicity
6 as we can possibly give to this, Your Honor. And as I say
7 again, Your Honor, if it wasn't the unique nature of these
8 assets, the sensitivity of these assets and what has happened
9 in the marketplaces -- one of the purposes of doing this
10 transaction, Your Honor, is to try and soothe the markets and
11 to -- it'd be a counter force to the volatility that's going
12 on. I don't know if Your Honor has a screen in your office,
13 but if you watched what's happening to the market today, it's
14 dangerous.

15 THE COURT: Unfortunately, I was too busy to look at
16 any screens and I don't want to find out later. But don't tell
17 me now, please.

18 MR. MILLER: I'm not going to tell Your -- it would
19 depress Your Honor to know what's going on out there in the
20 marketplace. So we have taken that into account and we have
21 also taken into account, Your Honor, the extremely unique
22 circumstances that we find ourselves in. This is -- I don't
23 want to compare it to some -- in a small case, Your Honor, that
24 you and I may have been involved in twenty years ago where you
25 had a boat of salmon sitting out on the harbor and the company

1 in Chapter 11 had no money to unload it. That's the kind --
2 this is such a perishable asset that if we don't take this
3 action, due process -- nothing will matter. And I think, Your
4 Honor, everybody who has been involved -- and with due
5 deference to Mr. Despins and Mr. Dunne. They haven't been
6 fully briefed on it. But every other party who's been involved
7 has recognized that problem, including Your Honor, the
8 Securities and Exchange Commission, the Securities Investor
9 Protection Corporation and the Federal Reserve Bank.

10 Your Honor -- I have to tell Your Honor, there wasn't
11 an intention to file so quickly except what happened over the
12 past weekend. We would have had more time to deal with these
13 problems. And we understand what Your Honor is under in
14 connection with due process. But this has been so notorious.
15 I mean, we have filled up newspapers, we have filled up CNBC
16 and CNN with stories. We only got pushed off last night by
17 AIG. We would have liked to have had a portion of the eighty-
18 five billion dollars but we couldn't get it. So I think, Your
19 Honor, the proceeding is notorious.

20 THE COURT: I'm going to take judicial notice of the
21 fact that we have a packed courtroom where we have people
22 standing and we have an overflow courtroom, the fact that there
23 are parties represented by experienced and sophisticated
24 counsel, as evidence that there's no question that parties-in-
25 interest and parties who are just plain interested know about

1 today's hearing. And I've also had an opportunity to
2 understand through the press and television and the internet at
3 least some of the proposed terms and conditions of the
4 transaction. I think for that reason, I am inclined to
5 conclude that while this is unusual, and should not be viewed
6 as a precedent, I believe that here due process is satisfied
7 simply by virtue of the fact that we're all here together and
8 that we know what we're talking about.

9 MR. MILLER: I would only add to what Your Honor said
10 that yesterday was the organizational meeting called by the
11 Office of the United States Trustee which was in a ballroom at
12 the Park Lane Hotel in New York City. And if Your Honor had
13 been in that room, Your Honor would have seen an overflow
14 audience of people standing all through the hallway. So this
15 is a known situation, as Your Honor has pointed out. So we
16 really support Your Honor's ruling that there is adequate due
17 process.

18 THE COURT: Okay. So we've gotten over that hurdle.
19 Now, we have Mr. Despina's request on behalf of the newly formed
20 committee that has newly retained counsel to put this over for
21 a hearing tomorrow. I want to just comment that I have some
22 issues with respect to that because of my own calendar. But I
23 will attempt to address that if, in fact, after hearing
24 argument, if that's necessary, we need to adjust the timing.
25 But is this the time to debate that question? Or would counsel

1 benefit from a chance to confer? I'm prepared to do it either
2 way.

3 MR. MILLER: Your Honor, I think --

4 THE COURT: My only sense of this, based upon your
5 presentation, is that while I am sensitive to the needs of the
6 creditors' committee to have as much time as possible to
7 prepare whatever papers it may choose to file, including papers
8 in support of the transaction for that matter, I am also
9 conscious of the time line that you have outlined. And what I
10 consider to be the imperative that this transaction, if it is
11 to be approved, be approved before the end of the week. As a
12 result, the request not yet argued by Mr. Despins that this be
13 put over, that is, this aspect of today's hearing be put over
14 till tomorrow morning, raises in my mind an additional due
15 process question which is that the sale procedures and the sale
16 hearing are even closer together than they would be if I were
17 to approve the sale procedures today. So that while we take
18 away from the committee's time to respond to this procedural
19 motion by approving it, if I do, today, we also take away from
20 everybody's time to address the merits of the transaction if I
21 approve it tomorrow instead of today. So, that's the conundrum
22 that I face.

23 I am inclined not to grant the proposed request for
24 an adjournment for multiple reasons but I also don't wish to
25 cut off argument unnecessarily. The multiple reasons include

1 the following: one, I have a calendar tomorrow morning which
2 includes a number of other cases. And, at least in this court,
3 every case, regardless of size, is entitled to access to the
4 Court. And some of the cases that I'm hearing tomorrow are
5 quite large. Secondly, I believe that this very fast track
6 case needs to be addressed in an extraordinary way. And for
7 that reason, while I would, under ordinary circumstances, be
8 very sensitive to the request of committee counsel to have
9 additional time, and I've been in that spot myself when I was
10 in practice, I think that to delay the approval of the sale
11 procedures would send an intolerably awkward message to the
12 world. And I'm not prepared to preside over the delivery of
13 such a message. I believe that we should maintain the schedule
14 that we're on recognizing that it imposes some burdens on the
15 parties who need to appear and be heard. But I will also state
16 that for purposes of the sale hearing, I will be
17 extraordinarily liberal in allowing parties the ability to
18 object if they wish to at the very last minute as soon as we
19 call the hearing because I think that's also consistent with
20 due process.

21 MR. MILLER: Your Honor, we have no objection to
22 that. As far as we're concerned, Your Honor, you can extend
23 the objection date to the hour before whatever the time of the
24 hearing will be on Friday.

25 THE COURT: Since you offered that, that's what we'll

1 do.

2 MR. MILLER: Very good, Your Honor.

3 MR. DESPINS: Your Honor, normally and with short
4 deadlines like this, we -- I should say, sometimes the Court
5 dispenses with the filing of an objection, frankly. We can
6 make the arguments at the hearing.

7 THE COURT: As far as I'm concerned, every party-in-
8 interest who has a legitimate need to express a position on the
9 record will be free to do so at the sale hearing regardless of
10 whether papers have been filed of record consistent, however,
11 with providing some fair notice to the debtor of the kinds of
12 arguments that are going to be asserted. I don't think that
13 this is appropriately to be designed as a hearing by surprise.
14 So, as long as there is adequate notice, I think that would
15 work.

16 MR. MILLER: Absolutely, Your Honor. And anybody who
17 has an interest, Your Honor, can contact my office. We will
18 spend the time to explain things. We will set up meetings. We
19 are very sensitive to the due process argument, Your Honor.
20 And I agree with Your Honor. Anybody who has a statement to
21 make, if it's a substantive statement, we'd appreciate a little
22 notice of what it's going to be but it can be oral without any
23 problems.

24 THE COURT: I think you're entitled to that notice.
25 And I guess I'll be the only one surprised by what happens.

1 But as long as you know, I mean, if you're prepared, that's
2 fine.

3 MR. MILLER: Yes, Your Honor. And, Your Honor, if
4 Mr. Despins wants to debate the adjournment, if I may, I would
5 adopt all the reasons in the argument Your Honor is making.

6 THE COURT: You've always been a wise advocate.

7 MR. DESPINS: I think I'll pass on that, Your Honor.

8 MR. MILLER: Your Honor, if I could go back at this
9 point to the breakup fee, I would just note that if you took
10 the cash that's coming out of this transaction and you took the
11 cure amounts, the retention program, it comes up to 5.7 billion
12 dollars. A hundred million dollars, Your Honor, is
13 approximately two percent of that. Now, I grant you there's
14 some flex in those other two items. But given the enormity of
15 this transaction, Your Honor, from the debtors' perspective,
16 and we actively negotiated this, Your Honor, it's not an
17 unreasonable breakup fee. And if that's what gets the
18 transaction moving forward and as Your Honor pointed out, the
19 markets out there are very, very sensitive to what happens here
20 today. The employees are waiting. I mean, one of the things
21 filed -- I will withdraw. I was going to say something I
22 shouldn't say, Your Honor. The employees were going to come
23 down here en masse. It made me think of every time you have an
24 airline case, when the pilots are here. But we didn't think
25 that was necessary, Your Honor. There's just a lot of human

1 capital involved in this as well as the economic circumstances.

2 So we would ask Your Honor to approve the breakup
3 fee.

4 THE COURT: Before I do that, I can tell that there
5 are people who wish to be heard. I don't know if they wish to
6 be heard with respect to the limited question of the breakup
7 fee or whether they wish to be heard more broadly with respect
8 to the proposed bid procedures that you have on the table.

9 MR. MILLER: I was just going to go into the bid
10 procedures, Your Honor.

11 THE COURT: Excuse me?

12 MR. MILLER: I was just going to go into the bid
13 procedures.

14 THE COURT: All right. Well, there's someone behind
15 you who's obviously very pushy because she has made it to -- I
16 don't know who she is or why she's here in the middle of your
17 presentation. Who are you?

18 MS. SMITH: Your Honor, my name is Liz Smith. I'm
19 with Dewey & LeBoeuf and I represent the excess SIPC insured,
20 CAPCO Holdings and Customer Asset Protection Company which was
21 not involved in the process, has not been called, has not been
22 spoken to at all about what's going on here.

23 We don't object to the breakup fee but I do have a
24 limited objection to the actual terms of the proposed order
25 which I believe has been revised. And I was just shown it a

1 moment ago. And so I would like the opportunity before Your
2 Honor signs anything to discuss that with the debtor --

3 THE COURT: Well, let me make a statement which I
4 think applies broadly to other people who may be similarly
5 situated. Just in the interest of good order because we have
6 such a packed courtroom here today and many of the faces in the
7 room are familiar to me, many are not. I don't know yet who
8 everybody represents except for the principal players. And
9 it's entirely conceivable given the shortness of notice that
10 there may be comments that can be reasonably made to debtors'
11 counsel about the form of the proposed order. I don't think
12 this is the time to get into that unless it is a truly
13 substantive matter that requires the attention of everyone.
14 I'm not trying to cut off anybody's discussion time.

15 MR. MILLER: I would propose, Your Honor, if Your
16 Honor is to grant the motion that we would sit down -- Ms.
17 Smith?

18 MS. SMITH: Yes, thank you.

19 MR. MILLER: -- and anybody else --

20 THE COURT: Exactly my point.

21 MR. MILLER: -- and see if we can come up with a
22 consent order.

23 THE COURT: That's fine.

24 MS. SMITH: That would be ideal, Your Honor. Thank
25 you again.

1 THE COURT: Sure. And I think that what I'd really
2 like to find out because we have a fairly large and diverse
3 group of people is whether there are parties who represent
4 those who have complaints about the bid procedures, have
5 concerns about the bid procedures beyond the breakup fee and
6 beyond the timing because I have addressed the timing question.
7 The only questions that I think are really before me at the
8 moment are anything else that relates to the fairness,
9 reasonableness and appropriateness of my entering bid
10 procedures in the form proposed by the debtor obviously working
11 in concert with Barclays as the acquirer. So I'm prepared to
12 hear comments on that now if --

13 MR. MILLER: I would just describe very briefly the
14 bidding procedures, Your Honor.

15 THE COURT: Oh, that's fine.

16 MR. MILLER: Your Honor, this sales transaction was
17 originated and was negotiated in the context that this was not
18 the usual stalking horse kind of a transaction. That we were
19 fortunate in finding an entity which was prepared and had the
20 finances to acquire this as a going concern. However, we
21 wanted to -- we and the purchaser, Your Honor, wanted to
22 provide that in the event that at the sale hearing or before
23 that another bidder came along, experienced counsel
24 representing Barclays, Cleary Gottlieb, said we should be
25 entitled to some protection in connection with the bidding. So

1 the bidding procedures, Your Honor, are basically that the
2 first bid that would be made by a competitor has to take into
3 account the breakup fee and the reimbursement of expenses and
4 spend something. So the first overbid, Your Honor, has to be
5 175 million dollars over the 1.7 we're using as the base line,
6 the 1.7 billion.

7 THE COURT: You said 175?

8 MR. MILLER: 175 million, Your Honor.

9 THE COURT: My understanding was that the breakup fee
10 was a hundred million, that the expense reimbursement was
11 twenty-five million --

12 MR. MILLER: Right.

13 THE COURT: And is there then a fifty million dollar
14 minimum overbid?

15 MR. MILLER: That's correct, Your Honor. And then
16 the proposal, Your Honor, is the next bid, the increments of
17 bidding thereafter would be at a hundred million dollars with
18 the right to match -- right to match?

19 UNIDENTIFIED SPEAKER: Yes.

20 MR. MILLER: Yes.

21 THE COURT: I have a question based upon that.

22 MR. MILLER: Yes, sir.

23 THE COURT: I don't understand the rationale for a
24 fifty million dollar overbid. If there's a real player in the
25 game prepared to do everything that Barclays is doing and is

1 anxious for a competitive auction, why make it any harder for
2 that party to come into the process? I don't understand why we
3 should have a high hurdle.

4 MR. MILLER: Your Honor --

5 THE COURT: I'm just asking the question.

6 MR. MILLER: No. All I can say, Your Honor --

7 THE COURT: I'm assuming if I have the question,
8 others in the room might have it, too.

9 MR. MILLER: I will leave it open for comments, Your
10 Honor, but every time I have seen an overbid process, it's not
11 only to cover the breakup fee and expenses but there has always
12 been another increment on top of it. To be perfectly candor,
13 Your Honor, it is somewhat protective of the original bidder.
14 And if somebody's really interested in this, Your Honor, and
15 really wants to make a bid, I don't think that fifty million
16 dollars is going to make much of a difference.

17 THE COURT: All right. I understand your position.

18 MR. MILLER: So that's basically the bidding
19 procedures, Your Honor.

20 THE COURT: And when are bids due and how do bidders
21 who may be interested qualify to bid?

22 MR. MILLER: Your Honor, I'm going to take the same
23 tack that you previously stated. Anybody who wants to come in
24 at any time, we will entertain that. And again, I want to
25 repeat, I am offering my partners on a twenty-four hour basis.

1 THE COURT: Very generous of you.

2 MR. MILLER: So I don't know if there are any
3 comments on that, Your Honor.

4 THE COURT: Okay. Now that at least the broad
5 outline has been presented, is there anyone else who wished to
6 be heard on any of the substance?

7 MR. MILLER: I would just add, Your Honor --

8 THE COURT: Okay.

9 MR. MILLER: This is not --

10 THE COURT: You really are a hound for that, aren't
11 you? You're not giving up.

12 MR. MILLER: I just wanted to let the Court know that
13 the debtors have hired Lazard as its financial advisor and Mr.
14 Barry Ridings has been intimately involved in the construction
15 of the bidding procedures and involved in the negotiations of
16 the sales. And Mr. Ridings is in court here today, Your Honor.
17 Thank you, Your Honor.

18 THE COURT: Okay. Before you -- actually, now that
19 I've said what I said about not wanting to give up the podium,
20 I have a question for you and I want to ask it now even though
21 it's out of order. In reviewing the DIP agreement, I noted in
22 Section 5.16 that there is an obligation on the part of the
23 debtor to engage, Brian Marsal as CRO. I found that by
24 accident. It wasn't revealed in the motion itself. And I am
25 concerned, I'm letting you know this --

1 MR. MILLER: Yes, sir.

2 THE COURT: -- that it's probably an extraordinary
3 provision. I'm bringing it up now because there's also a
4 reference in the same long document to the hiring of a
5 financial advisor not identified by name, and now I know who it
6 is. I'm just alerting you, you don't have to comment now
7 because I think we should limit ourselves to the bid
8 procedures. But I'm concerned about that. I want to know more
9 about it. It seems to me to be a material provision that
10 wasn't disclosed. And there are event of default consequences
11 that appear to flow from his not being retained and kept on
12 board. I view that as an unusual provision and one that
13 because it limits my discretion is serious. So I wanted to let
14 you know about it, not sandbag you with the issue when you've
15 come up with the DIP, and be in a position to give me some
16 thoughtful remarks. And I'd rather not do it now. But I'm
17 just letting you know about it.

18 MR. MILLER: Very good, Your Honor.

19 THE COURT: Okay.

20 MR. DESPINS: May I, Your Honor?

21 THE COURT: Absolutely.

22 MR. DESPINS: Again, for the record, Luc Despins with
23 Milbank Tweed, proposed counsel for the committee. And this is
24 going to be -- I apologize. This is going to be a little bit
25 disorganized because we're getting up to speed at the hearing

1 literally. So there will be a series of comments and perhaps
2 questions that can be clarified. The first, and I apologize
3 for doing this, I want to clarify that the no-shop is gone. Is
4 that correct? That there's no no-shop provision anymore?
5 Okay. So therefore, the debtor is free to speak to any bidders
6 whatsoever. Okay. The other issue Your Honor identified is
7 the issue of the overbid. We don't think that a fifty million
8 dollar overbid is required under the circumstances and
9 certainly, not going forward always keeping a high overbid for
10 future bids.

11 Clarification, Your Honor, which is on the issue of
12 timing of Friday's hearing, if you're approving these bid
13 procedures today, will we be able to argue on Friday that the
14 sale should not proceed or that's -- besides the merits of
15 whether the sale is a good sale. Can we argue on Friday that
16 more time should pass between today and the actual sale hearing
17 or this is only going to be decided today and we are going to
18 be precluded from making that argument on Friday of this week.

19 THE COURT: Let me tell you what my reaction to that
20 is and others may have a different view. I decide one motion
21 at a time. I'm deciding the bid procedures motion and I'm not
22 inclined to grant your request for more time with respect to
23 approval of this particular request. On behalf of the
24 creditors' committee, you are free as to this matter and any
25 other matter that may come before me throughout the case to

1 appear and raise any issue that you consider appropriate under
2 the circumstances. I may not always agree with you but you're
3 free to raise it.

4 MR. DESPINS: Thank you, Your Honor. Then there are
5 issues related to the breakup fee, Your Honor. Putting aside
6 the size of it, and we'll come back to that in a minute, and
7 again, this may be plumbing and I apologize for bothering the
8 Court with this. But there's an issue over the trigger for the
9 breakup fee. I think in the motion it says that it's triggered
10 by another competing offer being consummated. And again, we
11 don't agree with the size of the breakup fee but that concept
12 is fine. But I want to confirm that if, for example, the
13 transaction is terminated because, for example, the Court does
14 not approve the transaction on Friday of this week, that it
15 will not cause the payment of any fees to the purchaser.

16 MR. DUNNE: We'll get right back to that.

17 MR. DESPINS: Okay. The next issue, Your Honor, is
18 the size of the breakup fee. Mr. Miller mentioned the fact
19 that there are cure costs. That doesn't go to the estate; it
20 goes to third parties. That's not, with all due respect, we
21 don't think it's appropriate, Your Honor, to consider that in
22 looking at the size of the breakup fee. What is relevant is
23 what is coming to the estate. What's coming to the estate, if
24 I understand correctly, is 250 million dollars plus the
25 appraised value of several properties. They believe that it's

1 going to be 1.75. However, and again, maybe we misread the
2 agreement, it appears that the debtor is leaving behind in the
3 broker 1.3 billion of cash or cash equivalents. I could be
4 wrong on that but maybe that'll be clarified. If that's the
5 case, and again, I hope I'm wrong, then the -- what's happening
6 is that -- it's not 1.7. It's 1.7 minus 1.3. So again, we
7 apologize for raising this in this context. We would never do
8 that normally but we didn't have time to really --

9 THE COURT: Well, this is an extraordinary case and I
10 guess the benefit is Mr. Miller gets the opportunity to raise
11 things that he might not ordinarily raise given the timing and
12 so do you. So that's fine. Everything's open as far as I'm
13 concerned at this point. And I hear your arguments and some of
14 them -- I'm sure you'll be able to -- maybe we can take a break
15 at some point although it's going to be awkward to orchestrate
16 with this many people and you might have an opportunity to talk
17 a little bit with Mr. Miller or one of his volunteered
18 partners.

19 MR. DESPINS: Okay. So, Your Honor, putting aside
20 the 1.3 billion dollar argument, if you look at what the estate
21 is getting, it is really a breakup fee of a hundred million on
22 1.750 because it is a good thing for third parties that they're
23 getting paid by the purchaser. But that doesn't bring money to
24 the estate. So I want to make sure that that is not lost on
25 the Court. I think --

1 THE COURT: Well, I hear what you're saying but let
2 me tell you that at least in my experience, and I'm guessing in
3 yours, too, when considering the notional value of the
4 transaction, assumed liabilities are very often included and
5 avoided obligations are very often included for purposes of
6 determining the overall value. Certainly, when investment
7 bankers seek to be retained, they include everything they can
8 for purposes of their fee. And I'm assuming that what works
9 for one category in terms of sizing a transaction probably can
10 work for another. But I hear your argument.

11 MR. DESPINS: That would be correct, Your Honor, if
12 those assumed liabilities had to be paid by the debtor. But if
13 they're pre-petition claims that are going to be with all the
14 other pre-petition claims, I'm not sure that you can, without
15 knowing what the dividend will be on unsecured claims, we can't
16 determine whether this breakup fee is reasonable.

17 Before I conclude on this, I'd just like to confer
18 with my colleague, Mr. Dunne, for one second.

19 THE COURT: Sure.

20 (Pause)

21 MR. DESPINS: Your Honor, for now, I think that these
22 are our comments.

23 THE COURT: Okay. I don't know who else is here. I
24 can tell Mr. Goldman is coming forward with a look of maybe
25 wanted to speak to me. Do you want to speak to me, Mr.

1 Goldman?

2 MR. GOLDEN: Good afternoon, Your Honor. I'm sorry
3 we were late and I wasn't able to give the court reporter a
4 card. My name is Daniel Golden. I'm with the law firm of Akin
5 Gump Strauss Hauer and Feld. We represent an ad hoc
6 noteholders committee consisting currently of, but I anticipate
7 it to grow, the following institutions: Pacific Investment
8 Management Company, Western Asset Management Company, Black
9 Rock and Agon. And in the aggregate, these four institutions
10 hold over nine billion dollars of the debtors' bonds, some
11 senior, some subordinated, some junior subordinated bonds.

12 Your Honor, the problem my clients are having is they
13 just don't know whether this proposal, this sale proposal, is a
14 good one or not. It may well turn out it's a great one. It
15 may turn out it's the only one. But we're never going to know
16 under the debtors' proposed bidding procedures. These aren't
17 bidding procedures; these are Barclays' protection procedures.
18 They're not designed out to ferret out higher and better
19 offers. They're designed to ensure that nobody has -- no other
20 party has a legitimate shot to make a competitive offer.

21 Your Honor, this is an extraordinary case. Nobody's
22 going to doubt that. And I assume for as long as this case
23 goes on, people are going to talk about how extraordinary it
24 is. But Your Honor has recognized that due process doesn't go
25 out the window simply because it's an extraordinary or an

1 extraordinarily large case. And there are concerns that Mr.
2 Miller addressed and the debtors have addressed dealing with
3 the regulators and the employees. But what I haven't heard
4 whose interests have been protected by these proposed bidding
5 procedures are the creditors who, after all, should be the
6 beneficiaries of these proposed bidding procedures. Mr. Miller
7 said that these bidding procedures were negotiated aggressively
8 with Barclays. I'd like to see what happened if they weren't
9 negotiated aggressively.

10 I understand, and I'm sorry I was late again, that
11 they've taken out the absolute no-shop provision. Well, we're
12 thankful for that. But how real is that when a competitive --
13 a potential competitive bidder has less than two days to put in
14 a competing bid. We have heard no testimony whatsoever, no
15 evidence whatsoever as to who else the debtors have talked to
16 in the weeks and months leading up to this crisis, what other
17 bidders were out there, what opportunities other bidders were
18 given to obtain confidential information. So the fact that
19 there's not -- they've taken out the no-shop clause isn't
20 sufficient. And I understand, I'm not arguing, Your Honor, at
21 this point because I understand Your Honor has ruled that we
22 are going to go forward today at today's hearing on the
23 approval of the bidding procedures. But we think the bidding
24 procedures themselves are inherently unreasonable. One of the
25 provisions in the bidding procedures is that the debtor cannot

1 recognize a competing bid unless it's a "superior proposal".
2 And that's a defined term. And one of the things that makes a
3 competing bid a superior proposal is that it's for at least
4 1,875,000,000 dollars. And you heard Mr. Miller explain how
5 they got to that number. They took the Barclays base bid of a
6 billion seven. They added on the hundred million dollar
7 breakup fee, the up to twenty-five million dollar expense
8 reimbursement and then a little bit of fifty million dollars on
9 top of that. The problem we have with that is the starting
10 point.

11 The purchase agreement does not provide that Barclays
12 is going to pay a billion seven hundred million dollars for
13 these assets. It provides that it's going to pay 250 million
14 dollars plus an appraised value for the company's headquarters
15 and two data center located, I think, in the state of New
16 Jersey. There is nothing in the papers that suggests how much
17 the building is worth or how much the data services are worth.
18 There's nothing in the papers that suggests what the appraisal
19 process will be, when it will be, how long it will be and
20 what's the mechanism. So, how in the world or why in the world
21 should the Court establish 1,700,000,000 dollars as the
22 Barclays bid. We have no idea as we sit here today other than
23 the debtors' representations that they think the Barclays'
24 proposal will turn out to be 1,700,000,000 dollars. So to
25 force a competing bidder to take that on faith and have to

1 compete by putting up not only the 1,700,000,000 dollars but an
2 additional 175 million dollars on top of that, we think is
3 unreasonable and was calculated to ensure there would be no
4 competing bids.

5 The bidding procedures provide that should a
6 competitive bidder make a "superior proposal", the debtors are
7 required to give Barclays forty-eight hours of notice so
8 Barclays can figure out what it wants to do with respect to
9 that competing superior proposal. Well, forty-eight hours
10 doesn't work with the debtors' time frame. So I don't know if
11 Barclays is willing to accept less notice or the debtors'
12 intent to extend the sale hearing. But their own provisions,
13 their own bidding procedures, don't work.

14 I understand, Your Honor, that the proposed September
15 18 deadline, tomorrow, to file objections has been removed.
16 And we think that's a good thing. The bidding procedures also
17 provide for matching rights. It's not clear the way they get
18 to that but they provide that Barclays has the absolute ability
19 to match any bid. It doesn't have to beat any competing bid;
20 it only has to match it. And that's always been a sore point
21 in bidding procedures. And we suggest that the matching
22 ability granted to Barclays is inappropriate and was designed,
23 once again, to chill competing bids.

24 For the very same reason that I talked about before
25 about what the Barclays bid really is, we don't understand the

1 calculation or the appropriateness of the breakup fee. We
2 don't know how much cash is actually going to be transferred
3 from Barclays to the debtors when this transaction closes or if
4 this transaction closes. And I do agree with Mr. Despins that
5 calculating the breakup fee as a percentage of the
6 consideration should definitely not include cure costs or saved
7 severance costs because that's not going to the debtors'
8 estate.

9 So I think, one, it's impossible to determine whether
10 the proposed breakup fee of a hundred million dollars
11 represents two percent, four percent, twenty percent.

12 THE COURT: It doesn't represent twenty percent, I
13 don't think.

14 MR. GOLDEN: Well, Your Honor --

15 THE COURT: But I hear you.

16 MR. GOLDEN: A couple more points, Your Honor. And I
17 know there's probably a lot of other people -- we understand
18 how fragile the situation is. And we don't stand here today
19 trying to scuttle the Barclays proposal. But Barclays, as the
20 proposed bidder, has dictated the time frames here. They have
21 dictated that the hearing must be Friday and that the absolute
22 closing date must be, I think, September 23. Everybody talks
23 about a melting ice cube. But there's just been no evidence,
24 no testimony, no anything other than attorney representations
25 as to the parade of horrors that would happen if there was

1 not the typical notice that you would have for a transaction of
2 this size. And maybe there is no typical notice for a
3 transaction of this size because there aren't many transactions
4 of this size that are generally approved by the bankruptcy
5 court.

6 THE COURT: I think this is the first precedent
7 actually.

8 MR. GOLDEN: Right. But give some reasonable notice
9 under the circumstances. We understand we're up against the
10 wall here. But that's not a problem of the creditors' making.
11 We weren't the ones who dictated the time frame for the Chapter
12 11 filing or for when they filed the motion for the sale or
13 when they filed the motion for the bidding procedures. And I
14 understand it may have been outside of everybody's control. Or
15 certainly not within the total control of the debtors. But,
16 Judge, give the creditors a break here. I mean, we need --
17 this is a big part of the debtors' asset base. We want to
18 ensure that if it's going to be sold to Barclays under this
19 proposed transaction that the debtors' estates are getting a
20 fair price for it.

21 There are some that suggest the building alone, the
22 headquarters on Seventh Avenue, may be worth as much as
23 Barclays is prepared to bid. We need to allow some shortened
24 but reasonable time frame to let this process play out so as to
25 determine with finality, so that nobody looks foolish, nobody's

1 embarrassed and that at the end of the day, everybody can say
2 we did the best we could under the circumstances, we got a
3 reasonable price for these assets and that nobody was taken
4 advantage of. Because if you read the bidding procedures as
5 drafted, if you understand the time frames as demanded by
6 Barclays and you understand the companion DIP motion which we
7 haven't even gotten to and presumably won't get to Friday, we
8 are very concerned that we will never know with certainty that
9 the estates were being fairly treated by this transaction.

10 We don't think we're asking for extraordinary relief.

11 THE COURT: What are you asking for?

12 MR. GOLDEN: Well, we are asking for an amendment of
13 the bidding procedures to deal with the issues I've raised
14 already. And we are asking for some modicum of time passed
15 Friday so that we can determine so that the committee, which
16 was just formed, presumably they've hired a financial advisor,
17 let the financial advisor speak to Lazard. Let the financial
18 advisor determine is there a third party out there that's
19 actually willing to compete for this transaction. Because
20 this -- with the glare of all the publicity that has shone down
21 upon this company over the last weeks and months, the last
22 thing we should be doing is going to a rush to judgment just to
23 get this asset off the blocks. Thank you, Your Honor.

24 THE COURT: Thank you. Mr. Mason?

25 MR. MASON: Thank you, Your Honor. Richard Mason,

1 Wachtell, Lipton, Rosen & Katz for JPMorgan Chase Bank. Your
2 Honor, I'll be very brief. I've heard counsel to the committee
3 and counsel to the ad hoc note holders. I believe, although I
4 haven't had the opportunity in this world to confirm this, that
5 my client might actually be the largest creditor of these
6 estates. I think, as Your Honor had heard yesterday, we
7 provided clearing advances starting on Monday for the
8 operations of the broker-dealer in the amount of eighty-seven
9 billion dollars. As of Tuesday, I think it was fifty-one
10 billion. I don't know what it is today but it's tens of
11 billions of dollars.

12 So I think our client is fundamental, in terms of
13 financing, to the operations of the broker-dealer. As Your
14 Honor knows, we have a guaranty claim against the holding
15 company secured by certain holding company assets or a secured
16 creditor in both places.

17 And what I could say about the timing, Your Honor, is
18 that I think, and I'm pretty sure my client thinks, that it is
19 urgent. I do believe that this is, as Mr. Miller has said, an
20 extraordinary situation. There is extreme sensitivity about
21 the timing of the sale hearing on Friday for some reasons that
22 we'll discuss with SIPC and the Fed, but it has to be carefully
23 coordinated such that if a sale hearing happens on Friday and
24 there's a bankruptcy of the broker-dealer prior to that time,
25 we need to make sure that the broker-dealer is financed and

1 that we're protected.

2 I know that in a normal circumstance a couple of
3 days' additional notice here and there for a sale hearing is
4 quite ordinary. I would be highly concerned, Your Honor,
5 although I'm not an expert in these matters, that if we're
6 trying to close a transaction on any day other than a weekend
7 day, it may be extremely difficult to do that. So that, I
8 think, might be one consideration that Your Honor would have
9 with respect to postponing a sale hearing, if Your Honor were
10 inclined to do so.

11 With respect to the process, given a recognition of
12 the urgency, we think it is quite incumbent upon the debtor,
13 and we understand that everybody has been working extremely
14 hard and it's been literally one long day for all of us since
15 Thursday, Friday or Saturday, but I think it's incumbent upon
16 the debtor, SIPC, the Fed and Barclays to get together in a
17 room with us in some fashion so that we can make sure, at least
18 as a process and financing matter, that if a closing is going
19 to happen on Friday or Saturday or Sunday, that it happen very,
20 very smoothly so that the operations are not interrupted. And
21 we're fully prepared, and I'm sure everybody else is prepared,
22 to do that.

23 With respect to the contract itself, Your Honor, we
24 very much appreciate your statement that objections can be,
25 frankly, lodged at the sale hearing. We'll give the debtor a,

1 as I tried to do before, before today's hearing, a condensed
2 notice of what our issues are. I'm sure we can work them out.

3 Just very quickly, among other things, we have a lien
4 on assets of the broker-dealer securing their tens of billions
5 of dollars in advances. And there's no clear statement in the
6 asset purchase agreement that once the assets are sold free and
7 clear really and we actually get paid there's a provision for
8 the sale and assignment of purchase contract. It would seem to
9 violate the provisions of the Bankruptcy Code that allow
10 parties to financial contracts, repos and the like to terminate
11 those contracts. I don't think that that was what was
12 intended. But there's an issue there. And the purchase
13 contracts really aren't even identified so people -- we're
14 going to be concerned about what's being assumed and what's
15 being left behind.

16 So hopefully we can work out all of these issues.
17 I'm sure we can. I think we all really need to work as quickly
18 as we have, unfortunately, in the past couple of days to try to
19 come to closure on these issues and, if Your Honor is to
20 approve a sale, to make sure that it actually happens very,
21 very smoothly.

22 THE COURT: I appreciate your remarks, but let me ask
23 a clarifying question.

24 MR. MASON: Yes, Your Honor.

25 THE COURT: On behalf of your client, recognizing

1 that you have reserved rights and talked about a process of
2 smooth coordination, do you have any objection to the bid
3 procedures?

4 MR. MASON: No, sir, Your Honor. I want to make that
5 clear. I have no objection to the bid procedures --

6 THE COURT: Fine.

7 MR. MASON: -- or to the break-up fee.

8 THE COURT: Fine. Just wanted to be clear on that.
9 Mr. Bienenstock?

10 MR. BIENENSTOCK: Good afternoon, Your Honor. Martin
11 Bienenstock, Dewey & LeBoeuf. I'm here representing several
12 clients not part of the group, just several clients: One is
13 Royal Bank of Scotland, which is a committee member; for
14 various reasons we discussed with the U.S. Trustee we're about
15 to start participating but have not so far; Bank of New York,
16 other than in its indentured trustee capacity; and The Walt
17 Disney Company.

18 The concerns that overlap all three go to Your
19 Honor's issue of due process and the break-up -- or the sale
20 procedure order in general. The nature of our claims, Your
21 Honor, and when I say "our" I mean all three clients I've
22 mentioned, is that we've done business, we've done trades with
23 subsidiaries of Lehman Brothers Holdings, direct or indirect.
24 There are losses in those trades, mostly now closed out, and we
25 have the guaranty of Lehman Brothers Holdings, unsecured

1 guaranty, backing up most of those losses.

2 So we have claims against subsidiaries that are
3 nondebtors, and we have a claim against the debtor. Royal Bank
4 of Scotland -- its claim, for instance, its gross claim on the
5 guaranties is between 1.5 and 1.8 billion.

6 The fundamental reason why I rose is to address the
7 due process issue of notice and hearing. It's implicit in both
8 that we're supposed to know what has been noticed and what is
9 being heard. And, again, through no fault of anyone, given all
10 of the exigencies that the debtor has explained, we found it,
11 at least during the hours we've had today, impossible to know,
12 from this asset purchase agreement, what the deal is in a way
13 that particularly affects us, specifically, is the debtor
14 selling assets of subsidiary nondebtors and saying to my
15 clients, who are creditors of the nondebtor subsidiaries, you
16 shall have no claim against Barclays, the purchaser, under
17 theories of successor liability, fraudulent transfer or
18 otherwise? Is it saying that?

19 And while I, in particular, very much appreciate the
20 offer to spend long hours with Mr. Miller's partners, it's
21 something I've done, and they're wonderful, what they say can't
22 change what this document says. This document talks about
23 purchased assets, excluded assets, excluded liabilities. And
24 then when you get into -- we'll call it the fine print, there
25 are parts of this document that says they can leave behind

1 contracts of subsidiaries.

2 Well, presumably, the ones that we have claims on
3 that resulted in lawsuits for my clients they would leave
4 behind. Or maybe not. Maybe they want to pay them. I don't
5 know. And I don't think there's anything the debtor's lawyers'
6 partners can say that -- I mean, it depends what the document
7 says. And this document doesn't -- read at its face it would
8 seem to say they can leave behind what is owed to my client,
9 those contracts, and we'll have no claim over it.

10 Now, if they're affecting a claim of my client
11 against a nondebtor subsidiary that it has against the
12 nondebtor subsidiary and would like to assert against the
13 nondebtor purchaser, two third parties who are nondebtors, it
14 creates Article 3 issues, Constitutional issues, whether Your
15 Honor can even hear that relief, grant that relief. We need to
16 know the answer, and the only way we'll know it is whether they
17 basically change the language to make it clear.

18 Now, one way they can do it is very simply to say
19 notwithstanding anything in this agreement or the proposed
20 order, nothing herein shall impair, release, extinguish claims
21 of creditors against the nondebtor subsidiaries and against the
22 nondebtor purchaser. We would like that. That would clear it
23 up quickly, and maybe if I thought a bit longer I'd slightly
24 change the language, but that's the notion.

25 But we have to know what Your Honor is being asked to

1 approve on Friday, or whenever this hearing is. And this
2 agreement, as it's written now, really creates things that we
3 would submit Your Honor doesn't even have jurisdiction to
4 grant.

5 Now, I want to point out emphatically that none of
6 the clients I'm here for today have decided to oppose or to
7 support this deal. We want to understand it first of all. We
8 think the Court needs to understand it to know if it's going to
9 have jurisdiction to approve it.

10 And bottom line: I think it's hard for me to imagine
11 that there should be one-offs of different creditors, parties-
12 in-interest of having different and probably overlapping
13 questions with the debtor's attorneys. Perhaps there could be
14 a session, as was done, for instance, in the Enron case.
15 Everyone was invited to speak to the real business parties to
16 ask their questions, to get them answered in a huge conference
17 room, so that we could at least understand what's going on
18 here.

19 That's fundamentally why I had to rise. Separately,
20 I do want to say that Royal Bank of Scotland completely
21 supports the creditors' committee position. There are
22 questions we have about the price that go beyond -- that even
23 go beyond, but I don't want to take the Court's time to get
24 into that. The Court probably knows what it wants to do on the
25 break-up fee and all.

1 And on the question of sympathies, if I heard the
2 debtor correctly, the debtor said if this isn't approved Friday
3 the employees are out the door. Well, if the employees are
4 saying to the rest of us they're leaving unless they get this,
5 we think that certainly changes the sympathies. We don't
6 really think -- we'll be pleasantly surprised, hopefully. We
7 don't really think the circumstances that exist allow for
8 competing bids. I mean, in this magnitude, serious companies
9 have to study the company, labor over the contract, talk to the
10 key employees. We don't think it's realistic in this short
11 time that's going to happen. The fact that Lehman was in the
12 press for a long time doesn't change that. Maybe we'll be
13 pleasantly surprised, and we hope we are.

14 We think the real question for the Court, whenever
15 this is heard, is go or no-go. It's based on the price, as was
16 already explained. And then when you look at getting in a
17 billion-seven hopefully -- but how much cash are you turning
18 over? Some press reports are talking in the billions. And why
19 is the company now wanting to borrow after turning over
20 billions? Why doesn't it just turn over less? That would
21 bring down the purchase price.

22 I mean, none of these questions are answered in the
23 papers. And, again, not to point fingers but they're just not
24 answered. And you can't have due process unless you know
25 what's being heard.

1 So, fundamentally, we would like all of the
2 businesspeople who have the answers to be available, not only
3 tomorrow but whenever this hearing is held, as witnesses so
4 that we can at least find out what the Court's actually being
5 asked to grant. Thank you.

6 THE COURT: Thank you, Mr. Bienenstock. Are there
7 others who wish to be heard?

8 MS. THOMAS: Your Honor? This is Stephanie Thomas on
9 behalf of the Pension Benefit Guaranty Corporation, on the
10 phone. I'd like to speak if everyone else there is done.

11 THE COURT: I can't tell if there's anybody else live
12 in the courtroom who wishes to be heard, but you have the
13 floor, so go right ahead.

14 MS. THOMAS: Okay. Thank you. PBGC is here today
15 because the lead donor in this case sponsored the pension plan.
16 The other pension plan owners, LBI, employs about nine or ten
17 thousand of the currently -- there's currently thirteen
18 thousand active participants. And LBI employs nine to ten
19 thousand of them.

20 It appears to us, from reading the asset purchase
21 agreement, that Barclays -- while they're hiring these
22 employees, they don't appear to be assuming the pension plan or
23 the pension liabilities related to these employees.

24 And Your Honor noted a little bit earlier that one of
25 the considerations in valuing an offer is to include the values

1 of liabilities assumed in the transaction.

2 We would like to just request that, in the event that
3 another bid comes in that is willing to either assume the
4 pension plan or the part of the pension plan attributable to
5 these employees, that the value of that, the value of the claim
6 that's being saved from PBGC having to terminate the plan would
7 be counted as part of that offer.

8 THE COURT: Request noted, and I'm sure that that's
9 something that will either be acceptable or not acceptable from
10 the perspective of the parties to the transaction.

11 MS. THOMAS: Thank you, Your Honor.

12 MS. LEVENTHAL: Good afternoon, Your Honor. Shari
13 Leventhal for the Federal Reserve Bank of New York. Your
14 Honor, the issue, as we see it here, is a timing question: How
15 quickly can this be done? And, with due respect, many of the
16 arguments that have been raised, we believe, are more
17 appropriate for Friday's sale hearing.

18 THE COURT: It's a useful preview for me, though.

19 MS. LEVENTHAL: Yes. At the New York Fed, we, like
20 many in this courtroom, have been working around the clock
21 since before last weekend. And as was widely reported in the
22 press, we started working around the clock in an attempt to
23 find a purchaser for Lehman.

24 And the sale process was widely reported, and what
25 was also widely reported is that there weren't that many

1 possible bidders. The number is very small. The number that
2 met the requirements in terms of financial capability and
3 regulatory qualifications -- we're not talking twenties, tens
4 even. We're talking one or two.

5 We believe that the timeliness here is -- the time
6 line that's been in place here is what is necessary, what is
7 required under these very, very unique circumstances. We're
8 looking, in terms of our mandate, at financial stability here,
9 and it is vitally important that this transaction go forward as
10 quickly as possible in order to preserve the financial
11 stability that, at this point, is already very fragile. Thank
12 you, Your Honor.

13 THE COURT: Thank you.

14 MS. BAMBACH: Your Honor, I'm Alistaire Bambach. I
15 am the chief bankruptcy counsel for the Securities and Exchange
16 Commission in New York. I'd like to make a few comments about
17 timing and the importance of the transaction. With me today is
18 my colleague, Dan Gallagher, who is the deputy director of our
19 Trading and Markets Division, who can address -- who can answer
20 questions specifically about the timing issue here.

21 As you are aware, the commission has a statutory
22 obligation to protect both the customers of the broker-dealer
23 and the public investors at the holding company level.

24 We strongly support this very, very important
25 transaction. It is in the strong interests of the investing

1 public. We have worked hand in hand in glove with the debtor,
2 with Barclays, and with the Fed to try to facilitate this
3 transaction over the last week or so.

4 We are hopeful that the transaction will move as
5 smoothly as possible in light of the many questions that have
6 been raised here today, but I think it's important that Your
7 Honor understand some of the timing issues that confront us,
8 confront the Fed and confront the debtor as we move forward.
9 And I'd like Mr. Gallagher, perhaps, to assist me in that, if I
10 may.

11 MR. GALLAGHER: I've been part of the team that's
12 been here with the Fed working hand in hand since late last
13 week and indeed with our chairman, sleeves rolled up, trying to
14 facilitate the deal that was on the table and then later
15 turning to this proceeding and trying to work with the
16 Securities Investor Protection Corporation, the firm, the Fed,
17 the CFTC to get this to a point where the firm would be in a
18 position to still be available Friday afternoon for a sale,
19 that has required extraordinary efforts by everybody involved
20 by the firm, Lehman Brothers, by their employees and the
21 regulators.

22 And I'm here not with a commission mandated statement
23 because, indeed, given the circumstances, we haven't gotten
24 formal commission approval even to be here, although they know
25 we're here. But we're here to just deliver the message that we

1 think it's critical for this to happen by the end of this week
2 also.

3 So I would support all of the comments already made
4 by my colleague at the Fed and my colleague from the
5 commission.

6 THE COURT: Thank you very much. Does the U.S.
7 Trustee wish to speak?

8 MS. ADAMS: Yes, Your Honor. Thank you, Your Honor.
9 Diana Adams, United States Trustee. Obviously, we're cognizant
10 of the unprecedented events that have been going on of the many
11 aspects of this case and the people involved and the
12 constituencies involved.

13 The constituencies are well represented in this
14 courtroom. The regulatory agencies that have just spoken to
15 the Court have seemed to have had the closest observation and
16 information as to the timing and what has been going on in the
17 past weeks. And I believe I have heard nothing that would
18 persuade me that they are not correct in their assessment of
19 the situation. And taking into account all of the
20 sensitivities that I know everybody in this room is well aware
21 of, we do support the position of the debtor in this case and
22 the regulatory agencies, Your Honor.

23 THE COURT: Thank you.

24 MR. DESPINS: Your Honor, please. I just had one
25 additional matter before Mr. Miller responds to all these

1 things.

2 THE COURT: Okay. I think, just in the interest of
3 good order, for future reference, without cutting anybody off,
4 I think we should have one opportunity for parties to express
5 whatever they have to express. And I'm going to give you a
6 mulligan. You can do it one more time.

7 MR. DESPINS: Of course, Your Honor. But as we
8 explained when we were retained, now an hour ago --

9 THE COURT: I understand, and you told me at the
10 outset that it was a little disorganized because of the
11 lateness of your retention, and that's fine. I'm just mindful
12 of the fact that this courtroom is packed and also --

13 MR. DESPINS: I understand.

14 THE COURT: -- extraordinarily warm.

15 MR. DESPINS: Okay. So I'll be brief. The DIP is
16 not before you right now but there is a link --

17 THE COURT: I think it is.

18 MR. DESPINS: No, no, but I'm saying it's not -- you
19 are not considering that right now. You'll consider it later
20 but --

21 THE COURT: Well, I guess it depends on how you
22 define "now". It's here before me today.

23 MR. DESPINS: Correct, but there is a provision in
24 the DIP document that says that if this agreement, meaning the
25 Barclays purchase agreement, is terminated by Barclays, the DIP

1 becomes due and payable.

2 So you could have a situation where -- let's assume
3 Your Honor, on Friday, decides "I'm not going to approve this
4 transaction at this time," what would happen is that if you
5 approve the DIP today the fees would be due, payable, etcetera,
6 and you would have to repay all of that plus the fee because
7 you didn't approve this transaction.

8 So I think it's important. It's one of these chorus
9 of provisions that you should be aware of. It's not -- again,
10 we're not discussing the DIP right now but it's linked to this
11 agreement, and I want to make sure you were aware of it.

12 THE COURT: I appreciate your pointing that out but
13 as you also pointed out, we're not discussing the DIP right
14 now.

15 MR. WASSERMAN: Your Honor, I'm Robert Wasserman, and
16 I am associate director in the division of Clearing and
17 Intermediary Oversight of the Commodity Futures Trading
18 Commission and also bankruptcy counsel for the commission. And
19 I just wanted to add that, in the interest of the futures
20 markets as well, this is a situation that really should be
21 dealt with as quickly as possible and that I support the
22 representations of my colleagues at the Fed and the SEC.

23 THE COURT: Fine. Mr. Miller, you're on again.

24 MR. MILLER: And, Your Honor, please, first, just to
25 alleviate the concerns of the PBGC, I am told, Your Honor, that

1 the pension fund is fully funded and there is no minimum
2 contribution that is due.

3 Your Honor, in listening to the presentations by the
4 various representatives of the creditors, they seem to have
5 lost cognizance of one thing: This debtor doesn't have any
6 money to operate without the total cooperation of JPMorgan
7 Chase, which settles those trades every night, which gives rise
8 to a liability of enormous proportions but which we don't have.
9 They have not taken into account, Your Honor, that just as of
10 yesterday there was a question as to whether we had enough
11 payroll to get through the day. And every single day as the
12 trades settle, there is a question as to whether we're going to
13 be short or we're going to be long.

14 This is not a Garment Center firm where you can sit
15 by and just wait while everybody goes out and looks for
16 bidders. This is an organization that, because of the
17 circumstances surrounding the filing, Your Honor, has no money.
18 It doesn't have the funds to operate without borrowing, and
19 who's giving the borrowing, Your Honor? Barclays. It's not an
20 eleemosynary institution. They're here to buy an asset, like
21 everybody else, and they're willing to support the debtor with
22 the DIP so they can get to a closing. That's a significant
23 thing, Your Honor.

24 So what -- Mr. Golden says we have plenty of time.
25 We don't have plenty of time. If this transaction goes away

1 Friday night, there is no more funding of anything, Your Honor.

2 We have a company, Barclays, which is supporting the
3 operations of LBI right now with a repo credit agreement so
4 they can settle the transaction. We don't have any sources of
5 funds, Your Honor. Nobody is sending cash to Lehman in the
6 settlement of the trades. They're demanding cash, yes. And
7 people have completely ignored out of this purchase price --
8 the biggest portion of this purchase price, Your Honor, goes to
9 the holdings corporation. That will give the holdings
10 corporation funds to administer the remainder of the assets.

11 Now, I'm a little bit shocked, having practiced with
12 Mr. Bienenstock for years, that he doesn't understand an
13 agreement.

14 THE COURT: Oh, he understands an agreement.

15 MR. MILLER: I think so. I think so. As far as --
16 we have a very large conference room, Your Honor. We could sit
17 down with a hundred lawyers or more. We'll bring the
18 businesspeople. That's not the problem, Your Honor. We said
19 we would do that, and we will do that. But what I want to
20 emphasize, Your Honor, is we have a problem with operations.
21 We don't have the funds. It's as simple as that.

22 THE COURT: Well, I'm going to cut through this at
23 this point. I think that I've heard substantially all the
24 arguments that could be made at a time like this about this
25 extraordinary transaction. And I think I've heard enough.

1 MR. MILLER: Thank you, Your Honor.

2 THE COURT: I believe that the work of lawyers, even
3 the best lawyers, under the pressure of time, necessarily is
4 imperfect but that the work product that has been created under
5 great pressure relating to the proposed sale of Lehman
6 Brothers' LBI asset to Barclays represents a transaction that
7 should be heard on the merits. We are not hearing whether or
8 not this transaction should be approved today. We are dealing
9 with a procedural bridge to a hearing to take place on Friday
10 afternoon.

11 I am satisfied, based upon what I have heard from
12 debtor's counsel, counsel for the various regulatory agencies,
13 JPMorgan Chase and others who recognize the critical timing
14 imperative that drives today's agenda, that this bid procedure
15 package, to the extent it can be improved, perhaps it can be,
16 but this bid procedure package, in one form or another, must be
17 approved today.

18 And I am bench ordering that it is approved subject
19 to such adjustments as may be required to accommodate some of
20 the changes that I've heard about only orally based upon
21 comments made that there are various changes. So the documents
22 in their form to be approved need to catch up with the
23 representations that have been made on the record.

24 The break-up fee has become a subject for discussion,
25 in part because it goes to the question of whether or not the

1 amount of the bid procedure relative to the fair notional value
2 of the transaction is so disproportionately large relative to
3 market that it shouldn't be approved as is. Mr. Golden made
4 the point in his remarks that it could be as much as twenty
5 percent. I, on the spot, disagreed with him. But what it does
6 point out is something that I think is apparent to everybody
7 who's observed this: It depends on how you count.

8 I'm not worrying about this as a percentage
9 transaction. Given the circumstances that brought us to this
10 point, I recognize that this was a negotiated number, not
11 necessarily designed to encourage bidding but a number which
12 nonetheless represents, depending on how you count, a
13 percentage that may be within market.

14 More importantly, while I would welcome the
15 opportunity to preside over a hearing in which some third party
16 within the class of one or two that may be in the zone of
17 potential purchasers for these assets, this is, for all
18 practical purposes, a private sale.

19 And while I don't mean to suggest that the notion of
20 bid protections and higher and better bids represents an
21 unreasonable, unrealistic or fanciful notion, I'm also
22 satisfied, based upon what I have heard, that there is
23 effectively one logical purchaser for these assets. That
24 purchaser has already identified itself, has been identified
25 publicly to the markets, has been identified publicly to the

1 employees and represents the continuity for this operation.

2 Those lawyers recently engaged by clients who would
3 seek to convert today's hearing into an opportunity for a more
4 traditional bid procedure, I think, missed the point. This
5 deal is the deal to be approved up or down on the merits when
6 we have a hearing on Friday.

7 If there is a surprise, and the events of the last
8 several weeks suggest to me that surprises are possible, and we
9 actually have another transaction to consider that is more
10 favorable and it's possible for that transaction to be approved
11 and to take place on what amounts to turning on a dime, the
12 smallest currency we'll ever hear in this case, I'm prepared to
13 allow for that possibility.

14 But I think we need to confront the realities of
15 today's hearing with a dose of reality. This is the
16 transaction that will allow for continuity of operation, absent
17 some extraordinary event.

18 The debtor will have a burden at the time of the
19 approval hearing to demonstrate the benefits to the estate
20 associated with the transaction. The committee will have a
21 full opportunity, as will other parties in interest, to address
22 the merits of the transactions, whether or not it represents
23 optimal value for all parties in interest. I recognize that
24 there are constituencies represented here that may not have
25 purely aligned interests, but it's also true that the employees

1 of this enterprise are parties-in-interest, that the value they
2 represent, in combination, well managed, provide services of
3 enormous value to the world economy. And I'm paying attention
4 to that.

5 As to the specifics of the bid procedures, to some
6 extent we are dealing with an adhesion contract. This is a
7 transaction that was negotiated by others and is being
8 presented in public. It's a nonnegotiable deal. I accept
9 that. If the circumstances were different, I might push back.
10 I'm not pushing back today.

11 Accordingly, I'm prepared to approve the bid
12 procedures, and I'm also prepared to suggest, since it's now a
13 minute past 6 and we have a large courtroom of people, some of
14 whom have been here since my 2:00 calendar today, that we take
15 a break in the action, assuming that we can all appropriately
16 reconvene in a timely way.

17 And just given the number of people involved, and
18 maybe the number of people who need to also confer, I'm going
19 to suggest a twenty-minute break. And I'll adjourn until 6:21,
20 22, more or less. We're adjourned till then.

21 (Recess from 6:04 till 6:59 p.m.)

22 THE COURT: Please be seated.

23 MS. SCHWEITZER: Good evening, Your Honor. I'm Lisa
24 Schweitzer from Cleary Gottlieb Steen & Hamilton, representing
25 Barclays. I understand we're now turning to the DIP motion.

1 In connection with the DIP agreement, Barclays and the debtors
2 have also entered into a separate letter that contains the fees
3 related to the DIP, and it also contains certain terms related
4 to a potential syndication of the DIP.

5 And as is customary or frequently done in these
6 situations, the parties agreed that we would share the terms of
7 those letters with the U.S. Trustee, the creditor committee.
8 And I hope that Your Honor has been given a copy of those.

9 THE COURT: I don't have it yet.

10 MS. SCHWEITZER: Okay. I understand it was being e-
11 mailed to you or to chambers. I'm sorry, a copy just went in.
12 I apologize. We're very short of copies right now, so -- Your
13 Honor, may I approach?

14 THE COURT: Well, I guess that keeps it confidential,
15 doesn't it?

16 MS. SCHWEITZER: Yes. May I approach, Your Honor.

17 THE COURT: You may. What about it?

18 MS. SCHWEITZER: So, in terms of this, what we had
19 discussed with the debtors is the contemplation that we have
20 presented to these entrusted parties, namely, the creditor
21 committee and the United States Trustee and Your Honor. And
22 the creditors' committee has raised certain concerns and
23 objections to the fees that are being proposed in connection
24 with the -- in the DIP, and --

25 THE COURT: Well, the fees aren't confidential, are

1 they?

2 MS. SCHWEITZER: Well, these -- the terms of the fees
3 are --

4 THE COURT: Why should they be?

5 MS. SCHWEITZER: Well, we would say that these are
6 competitively sensitive and also secondarily to fees --

7 THE COURT: I'm sorry.

8 MS. SCHWEITZER: But --

9 THE COURT: I'm sorry. It's a material term of the
10 DIP facility. This is a public hearing. I can understand
11 certain terms and conditions of the letter itself being
12 confidential but the amount of the fees? I'm sorry. That's
13 part of this record.

14 MS. SCHWEITZER: I understand, Your Honor. We would
15 intend to make it part of your record, and what we had proposed
16 is that the terms will be filed under seal. The second thing
17 that's in the --

18 THE COURT: Well, then you should have sought to file
19 those terms under seal before this hearing started.

20 MS. SCHWEITZER: Your Honor, we had contemplated
21 that, and we -- I apologize that we hadn't done that.

22 THE COURT: This isn't about apologies. It's about a
23 public hearing on incredibly short notice with giving everybody
24 who's interested in this very important transaction a fair
25 understanding of the essential economic terms. That's

1 different from a confidential fee letter. And I feel very
2 strongly that you're in the fishbowl of bankruptcy and it needs
3 to be disclosed.

4 MS. SCHWEITZER: Okay, Your Honor. Just to point out
5 to you, the second set of terms that are in the fee letter are
6 certain terms related to the syndication. And we had felt that
7 it was in the interest of the debtor as well as the lender to
8 keep those terms confidential because, in fact, if this
9 syndicated that could affect the ability to syndicate the loan.

10 THE COURT: I'm perfectly sensitive to the need to
11 keep certain terms and conditions of this document, which I
12 have not yet read, confidential to the extent that it
13 constitutes proprietary commercial information properly to be
14 sealed under Section 107, but there's been no showing yet that
15 any of that is true.

16 And as to the amount of fees payable in connection
17 with the transaction, it seems to me that's fair for reasonable
18 debate. And I'm trying to find out what you're trying to keep
19 confidential.

20 MS. SCHWEITZER: Um-hum. Well, I think that one of
21 the reasons that this loan is different than other loans is
22 that this loan is secured by one asset, which is the stock of
23 Neuberger, as opposed to a blanket on all of the debtor's
24 property.

25 THE COURT: Um-hum.

1 MS. SCHWEITZER: And so that this is a slightly
2 different loan than a typical loan. It's more as if you were
3 making a margin loan. And the pricing here is certainly --
4 many people would say margin loan pricing is competitively
5 sensitive and it would reveal, beyond just a DIP loan with
6 lender fees, that it's priced a different way. And, certainly,
7 we feel this is a market term pricing, and we negotiate quite
8 heavily and painfully with the debtors to come to these fees.
9 But Barclays would view that as different than setting a
10 precedent for every instance, being that every DIP lender is
11 entitled to hide its fees.

12 What we had proposed, Your Honor, and I think that
13 the debtors and the creditor committee would be in agreement
14 with this, is that if we could have an initial conference with
15 Your Honor where the committee would be able to raise their
16 arguments, then that we could raise our arguments and explain
17 how this was priced.

18 THE COURT: Doesn't work that way. This is a public
19 hearing. This is a public hearing, and absent a sealing order,
20 and there's no time for that, the world is entitled to know
21 what's going on here. If I know it and it's not truly
22 confidential information, and there's been no showing that it
23 is yet, it needs to be disclosed.

24 Now, if we're going to have a mini-hearing as to
25 whether or not the items in this letter, in fact, constitute

1 confidential information within the definition of 107, I'm
2 prepared to do that, if necessary, but I also question why this
3 issue, as opposed to all other aspects of this DIP facility,
4 now becomes the gating issue for purposes of one of the most
5 important transactions any of us have ever dealt with. Can't
6 we get into this? And then if, in fact, it becomes relevant to
7 deal with the question of confidentiality and you wish to press
8 the issue, we can, either because the committee is in agreement
9 that it doesn't have to come in, and we can finesse the issue
10 that way, but if it's part of this record and it needs to be
11 confidential, you're going to have to make a showing, with
12 evidence, publicly as to why this is confidential, and I will
13 then make a ruling. But otherwise, for purposes of this
14 hearing and for this entire case, we are not wiping out the
15 Bankruptcy Code. We are simply dealing with an emergency DIP
16 hearing which happens in virtually every Chapter 11 case.

17 So we're now not talking about an emergency sale. I
18 know it's connected. We're talking about DIP lending. And DIP
19 lending practice is governed by Rule 4001, Local Rule 4001-2
20 and by a set of procedures that involve public disclosure of
21 extraordinary provisions. The fact that you are spending the
22 time that you have spent on this issue suggests to me this may
23 be an extraordinary provision. Whether or not an extraordinary
24 provision should be kept confidential is something I deem very
25 serious, and I am not going to discuss it in a chambers

1 conference.

2 If it comes out, it'll be discussed on the record.
3 And if I conclude that it's confidential, we will then have a
4 confidential hearing in which I will, if necessary, clear the
5 courtroom. But you're going to have a heavy burden to convince
6 me.

7 MS. SCHWEITZER: Okay. Well, that's understood, Your
8 Honor. What I would propose, in light of the hour and the
9 circumstances and other things that are on the docket,
10 including the rest of the terms of the DIP, is if we could put
11 this to the end of the discussion of the DIP.

12 THE COURT: Let's do that.

13 MS. SCHWEITZER: Okay.

14 THE COURT: I think that's a fine idea.

15 MS. SCHWEITZER: Okay. So I'll defer to the debtors
16 on the rest of the DIP motion, if you'd like.

17 MS. FIFE: Yup. Good evening, Your Honor. Lori
18 Fife --

19 THE COURT: Good evening.

20 MS. FIFE: -- from Weil, Gotshal & Manges on behalf
21 of the debtors. You've already heard that this is the largest
22 and undoubtedly the most complicated Chapter 11 case.
23 Nevertheless, and perhaps surprisingly, the DIP financing,
24 which the debtors seek approval of today on an interim basis,
25 is thankfully straightforward and uncomplicated.

1 THE COURT: I thought that until now.

2 MS. FIFE: I still think that, Your Honor. The
3 debtor's management and its professionals have worked arduously
4 over the past weeks to develop a plan to consummate the
5 Barclays sale. It maximizes the value of their estates in
6 extremely trying times.

7 Right now, their ability to consummate that sale
8 transaction, however, is contingent upon this Court's approval
9 of interim financing in the amount of 200 million dollars.
10 Without approval of the immediate ability to utilize the 200
11 million dollars under the proposed DIP credit agreement,
12 Lehman's operations may cease as early as tonight. The
13 results, including on employees and the value of the estates,
14 would be catastrophic. The debtors would lose substantial
15 benefits of the Barclays sale and likely would not be able to
16 realize on substantial other sales that perhaps will occur in
17 the future. Ability to maintain the debtor's business
18 relationships with its customers, pay its employees and satisfy
19 its other critical operating expenses is essential to its
20 ability to survive. But, as indicated, this is a simple loan,
21 so let me just turn to the provisions of the loan.

22 It is the -- Barclays is granted a superpriority
23 administrative claim and a perfected first-priority lien on
24 unencumbered collateral, which is basically the debtor's
25 ninety-nine percent membership interest in the stock of

1 Neuberger Berman, which is a subsidiary of the debtor, Your
2 Honor.

3 The proposed financing does not affect the rights of,
4 or the collateral position of, the debtor's existing pre-
5 petition lenders, and therefore we don't have to deal with
6 adequate protection, use of cash collateral, finding or
7 anything of that nature, Your Honor.

8 The debtor was unable to obtain funds on an unsecured
9 basis, and they were also unable to find funds on any other
10 type of basis and essentially was led to the Barclays financing
11 by virtue of the sale transaction. They believe that the terms
12 offered by Barclays are significantly more favorable than any
13 terms that would have been offered by other lenders and that
14 such terms arise largely from the fact that Barclays is the
15 proposed purchaser.

16 The amount of the DIP is 450 million dollars, and it
17 consists of a 250 million dollar term loan and 200 million
18 dollar revolving credit facility. Up to 200 million dollars is
19 the interim financing we are seeking. The maturity date of the
20 loan is the earlier of six months after the closing date, the
21 termination of the asset purchase agreement and the
22 consummation of a sale of Neuberger Berman. Of course, the
23 stock is the collateral and, therefore, if we sell the stock,
24 then we have to use the proceeds to pay off the DIP facility.

25 The interest rate on the loan is LIBOR plus six

1 percent for the first sixty days and LIBOR plus seven and a
2 half percent for the period thereafter, or base plus five
3 percent for sixty days and base plus six and a half.

4 THE COURT: Does that increase in the interest rate
5 represent an intention on the part of the lender to encourage
6 refinancing or repayment within that period of time?

7 MS. FIFE: Yes, Your Honor. I think there's a belief
8 that the DIP financing will not be outstanding for more than
9 two months, actually.

10 THE COURT: So it sounds like it's being priced like
11 a bridge loan.

12 MS. FIFE: Yes, it is, actually. A bridge to a sale.
13 The proceeds of the DIP credit facility can be used to fund
14 post-petition operating expenses, costs and expenses of the
15 administration of the Chapter 11 case, working capital, capex
16 and other general corporate purposes but in accordance with a
17 cash flow forecast. There are variances, though, from the
18 forecast that the lender has allowed.

19 The DIP agreement has your typical covenants: reps
20 and warranties, events of default, nothing that I would believe
21 are out of the ordinary. I think that perhaps that one --

22 THE COURT: The one that I think is out of the
23 ordinary --

24 MS. FIFE: -- provision, Your Honor, that --

25 THE COURT: -- is the one that I found involving Mr.

1 Marsal.

2 MS. FIFE: Right.

3 THE COURT: And maybe there are others but that's the
4 one I found.

5 MS. FIFE: Yes, Your Honor. I have seen that in
6 other DIP financings but during the break we consulted with the
7 lender and they've agreed to take that provision out.

8 THE COURT: That takes care of it then.

9 MS. FIFE: But I will tell you, we do intend to
10 retain Alvarez & Marsal.

11 THE COURT: That's fine, and just so it's clear, I'm
12 not, for a minute, opposed to the notion of the retention of a
13 CRO, nor am I opposed to the retention of Mr. Marsal, with whom
14 I've had some dealings long in the past. My concern, and I
15 just want it to be disclosed, was that, first, the fact that
16 this provision was in the loan agreement wasn't disclosed in
17 the motion. I assume it was an oversight. Second, it would --
18 approving the facility with that provision in it would have the
19 effect of removing the Court's discretion, which is not only
20 impermissible under the guidelines, or at least extraordinary
21 under the guidelines, but completely unacceptable to me.

22 MS. FIFE: Um-hum.

23 THE COURT: And so I want it to be very clear that,
24 and that's why I highlighted it, that I'm raising it not
25 because I have any concerns as to either the decision to engage

1 a CRO or to engage Mr. Marsal as the CRO but rather that it be
2 a limiting provision on my discretion and that also is was
3 included in the document in a way that I think material but not
4 publicly disclosed.

5 MS. FIFE: I understand, Your Honor, and I do have to
6 apologize for not disclosing it in the motion. As you gather,
7 I'm sure, we have all been working --

8 THE COURT: You've all been dancing as fast as you
9 can.

10 MS. FIFE: Yes. And some people working with limited
11 facts, and it just was an oversight. So --

12 THE COURT: I understand completely.

13 MS. FIFE: -- sorry for that. I did want to address
14 Mr. Despins' question regarding the sort of cross-default and
15 an early termination. It's not a cross-default but the
16 termination, the tie-in between the DIP financing and the asset
17 purchase agreement. If, in fact, the asset purchase agreement
18 is not approved, we have thirty days after that date to
19 refinance the DIP facility. And that is something, Your Honor,
20 that we negotiated very hard for. The purchaser and the
21 lender, in this case the same party, really wanted that to be
22 an automatic termination and automatic repayment but we
23 insisted on getting at least thirty days to refinance.

24 However, in the event that we accept a superior bid,
25 then in that situation we do have to repay the loan right away.

1 But we believe that that was something that was fair because we
2 would take that into consideration in making a determination as
3 to whether it was a better --

4 THE COURT: It'll be part of the exercise of the
5 business judgment to accept an allegedly superior deal.

6 MS. FIFE: Exactly, Your Honor. So hopefully that
7 addresses Mr. Despins' issues with respect to that provision.

8 There is a carve-out, Your Honor, of six million
9 dollars, which probably is small in this case but the
10 collateral is only the stock, so hopefully there'll be other
11 unencumbered assets from which to get paid.

12 And I don't believe that there are any other
13 provisions in the agreement that are particularly unusual. So
14 what I would ask Your Honor is that you accept the statements
15 of Mr. Miller and myself as a proffer as to the circumstances
16 of the DIP financing. And given the tragic events that have
17 enveloped this enterprise in this highly unfavorable business
18 environment, Lehman really requires the approval of this
19 interim financing to maintain the operations, pay its
20 employees, service its customers and preserve value for the
21 benefit of these estates or creditors and all parties-in-
22 interest.

23 We are trying to make the best of a bad situation,
24 and without this DIP financing the debtor's employees and the
25 business is at real peril.

1 I'm happy to answer any questions, Your Honor.

2 THE COURT: A couple. First, I'm prepared to accept
3 the proffer but it's a proffer of the testimony of which
4 responsible officer of your client?

5 MR. MILLER: Presidents and chief operating officer,
6 Your Honor.

7 THE COURT: Fine. Is there any objection to my
8 accepting the proffer in lieu of taking testimony from that
9 witness?

10 MR. DESPINS: Well, Your Honor, the proffer is that
11 we believe these are the best terms we could have that we could
12 have gleaned. I mean, I really don't want to do this but they
13 haven't chopped this facility. So if they want to admit that,
14 that's fine. Otherwise, we'll put the witness on and --

15 THE COURT: I believe they did admit that in the
16 motion papers.

17 MS. FIFE: That's correct, Your Honor. We --

18 THE COURT: I think I saw -- I saw a clear indication
19 that --

20 MR. DESPINS: But then I don't understand --

21 THE COURT: -- while it wasn't chopped, it was
22 believed by the debtor that this was the best available
23 financing.

24 MS. FIFE: That's --

25 MR. DESPINS: Well, then, we'd understand the -- I

1 really don't want to do this but what is that belief based on
2 if they haven't talked to any other lenders other than the
3 entity making a bid for the assets? And you'll see when we get
4 to the fees, Your Honor, but -- I know that these are extreme
5 circumstances, Judge. We understand that. But if we're going
6 to say that and everything goes, that's okay but the fees that
7 are being charged here are off the charts. And so I don't know
8 how to proceed. I really don't want to go down that path but I
9 think, Your Honor, if -- I don't know what the basis --

10 THE COURT: By the way, there's no obligation to go
11 down that path. I mean, this is your professional judgment,
12 that you feel the need to go down that path. Whether that's a
13 smart thing do I leave to you.

14 But I'm just here to deal with this hearing as it
15 unfolds. If you feel the need to deal with this in the
16 representative of your constituency, and if you think it's the
17 responsible thing to do, obviously, in your professional
18 judgment, you will do what you think is necessary and I'll
19 preside over the hearing that develops. If you, after
20 reflecting, think that maybe it's not necessary, that's up to
21 you. I'm not telling you what to do here.

22 MR. DESPINS: Okay, Your Honor.

23 THE COURT: I take it that's an objection to the
24 fees.

25 MS. FIFE: I understand that, Your Honor.

1 THE COURT: And I think it -- but I'm not sure if
2 it's an objection to the proffer. I just want to --

3 MR. DESPINS: Well --

4 THE COURT: -- I just want to be clear --

5 MS. FIFE: Right.

6 THE COURT: -- procedurally whether or not we are now
7 going to have to call as a witness an officer of Lehman for
8 purposes of putting on the record background information
9 concerning the development of the DIP, alternatives to the DIP
10 and other fairly standard 364-type findings.

11 MR. DESPINS: Your Honor, if they're willing to
12 stipulate that there was no attempt made to retain any other
13 DIP, that's the first point; the second point, that this
14 witness is not testifying as to the reasonableness of the fees
15 that are being charged by --

16 THE COURT: I don't think there's been any assertion
17 made in the proffer as to the reasonableness of the fees.

18 MR. DESPINS: Well, okay, if there are none --

19 THE COURT: Well, it just --

20 MR. DESPINS: -- but there's no evidence.

21 THE COURT: -- it just wasn't part of the proffer.

22 MS. FIFE: Right.

23 MR. DESPINS: Okay. In other words, it was unclear
24 what the proffer was. I mean, I know there was a presentation
25 made to the Court. I didn't understand there was a formal

1 proffer. So if there is no testimony on the record as to the
2 reasonableness of the fees, we don't need to cross-examine.

3 THE COURT: Fine. Then we'll accept the proffer, and
4 there's no need for the witness to testify.

5 MS. FIFE: Okay. Then, with respect to the fees, how
6 would you like to proceed?

7 THE COURT: Well, I mean, here's really the question:
8 I need to know whether or not the amount of the fees or the
9 terms for paying the fees, and I haven't had a chance to read
10 the letter yet, are deemed confidential by Barclays, and if so,
11 why. And I need to have what amounts to a mini-hearing on the
12 subject of possible sealing because these are allegedly
13 proprietary and confidential business terms that should not be
14 part of the public record, recognizing, as I think I made
15 abundantly clear, my belief that sealing is the exception and
16 not the rule and that cause has to be shown.

17 If Barclays is prepared to put on such a record, we
18 can then have a chambers conference or some other procedure,
19 which may include clearing of the courtroom, for purposes of
20 presenting that information.

21 I would hope, and I don't know if this hope is going
22 to lead to a reality, that it may be possible to deal with this
23 issue without having to go through each of those steps. There
24 are a lot of very smart, creative and experienced lawyers in
25 the room, and one of the things I need to know is if, for

1 purposes of the interim DIP facility, I know going in that the
2 creditors' committee, upon reflection of a document that isn't
3 in evidence and that isn't a part of the public record, asserts
4 that these fees are, I'll use the term, excessive or
5 unreasonable, why do we need to go into the specifics of what
6 they are if I know what they are? Do they have to be part of
7 the record? Can't the creditors' committee make a perfectly
8 rational argument without having to have a whole hearing about
9 it since I've been given the letter? And you've been given the
10 letter, and others have been given the letter.

11 If that's not an acceptable approach, and I'm not
12 here to design the approach that's acceptable, I am simply
13 making a suggestion, then I think we do need to go into the
14 specifics of whether or not this constitutes confidential
15 information.

16 But given the incredible significance of this
17 financing to this incredibly significant case and the fact that
18 interim DIP facilities, in my experience, routinely are
19 granted, often with more onerous terms, forget the fees for a
20 minute, than we're talking about here, and given the fact the
21 DIP facility is being offered by the most likely acquirer of
22 the assets that we're talking about, is it really desirable to
23 convert this into a public display? I question the wisdom of
24 that. Everybody's free to do their job, but I think everybody
25 should pay close attention to what their job really is.

1 Mr. Despins, it's really up to you. And I'm not
2 trying to impose on you at all. You admitted at the outset
3 you're new to the case. You have a job to do, and I know
4 you're going to do it well. But do we really need to go down
5 this road?

6 MR. DESPINS: Your Honor, if Barclays agreed that the
7 only thing you're approving today is a very limited fee and the
8 rest is left for the final hearing, I'll just stand down and go
9 home. But my understanding, limited understanding, based on an
10 hour of having this document is that Your Honor would be doing
11 more today than that, and if it's not that, and I want to be
12 precise about -- it's not the issue what's payable today; it's
13 payable or earned.

14 So if Your Honor is only approving a limited fee,
15 whether it's payable or earned today, that's fine. We can
16 leave the rest for the final hearing. But if Your Honor is
17 doing more than that pursuant to this order, then, Your Honor,
18 I feel I have a duty to bring to the attention of the Court
19 that these are -- these fees are --

20 THE COURT: Well, you've done that. I know that the
21 creditors' committee, upon review of the fee letter, believes
22 that the fees, not yet disclosed publicly, are not market and
23 are, I'll use the term, excessive.

24 MR. DESPINS: Well, it's --

25 THE COURT: Is that what you think?

1 MR. DESPINS: Yes, but, Your Honor, for example,
2 there's a pre-payment -- I'm not going to talk about what the
3 fee is but there's a pre-payment penalty in here. If the
4 estate finds another source of financing, wants to pre-pay, X
5 percent is due to the lender. That's -- I'm sorry that you
6 said it but that's not a standard provision for a DIP financing
7 and --

8 THE COURT: Well, let me say that, and I'm not going
9 into the specifics of my own professional background before I
10 took the bench, but I have more than a passing familiarity with
11 DIP lending practice --

12 MR. DESPINS: Um-hum.

13 THE COURT: -- as a practitioner. And it's always
14 been about the fees, and it always will be about the fees.

15 And so without taking away anything from your
16 argument, I don't know, because I haven't read this yet, and if
17 you want me to I'm going to take a break and read it, there's
18 always a fee letter.

19 MR. DESPINS: Sure.

20 THE COURT: The fees are always something which
21 lenders deem to be confidential. However, they are typically
22 disclosed: unused line fees, facility fees, a whole host of
23 fees. I don't consider a pre-payment to be at all off-market.
24 Now, that just may be that I represented extreme lenders in the
25 past but -- and I may have, but I can tell you that I'm not

1 shocked to hear that that's part of this transaction,
2 particularly since there is an opportunity, if the deal fails,
3 to refinance it. And to the extent that somebody else comes
4 forward with a better transaction, there will be a need to
5 refinance this facility in a heartbeat. That's the pre-payment
6 risk that I consider reasonable for a lender to guard against
7 and to provide for in fees.

8 So we're talking about one little aspect of this, and
9 I don't mean to focus on it too much, but I'm telling you I'm
10 not yet shocked.

11 MR. DESPINS: Well, that's one aspect, Your Honor,
12 and also I'm sure you'll agree that when you look at the pre-
13 payment fee you have to look at the length of the loan. So if
14 you have a pre-payment fee that's due in twenty days, and
15 that's the same size of pre-payment fee and the facility that
16 has a two-year term, it's quite different.

17 And so, Your Honor, what I would ask the Court,
18 because I think the Court needs to know what the fees are, is,
19 I'm not going to describe the amount of the fees for now, we're
20 not going to go in to that, but to look at the letter and
21 basically -- in paragraph 1 of the letter there's one type of
22 fee, a facility fee. There's also a closing fee in that second
23 paragraph of paragraph 1. In addition to that, there's a pre-
24 payment fee and there's a syndication -- I'm sorry, there is a
25 market flex in paragraph 4, and I won't describe the amount but

1 it's in there. And I would ask the Court to look at the
2 totality of these fees.

3 THE COURT: Well, let's just say, for the sake of
4 discussion, Mr. Despina, that I would agree with you that these
5 fees are off-market. Let's just say that as a hypothetical.
6 Where are we going with that argument? Are we saying that I
7 should not approve the interim facility and I should set a
8 match to this asset because it won't be financed?

9 This is the only financing I'm here to approve. What
10 are you proposing?

11 MR. DESPINA: Your Honor, I don't have the
12 replacement facility today, given that I was retained a few
13 years ago. But if that's -- I mean, that's -- I understand
14 your point but in a lot of cases I'm involved in and when I
15 represent the secured lender and the Court finds the fees
16 excessive, they'll say I'm not going to approve those fees on
17 those terms, you need to do better than that. If you're not --
18 I'm not asking you to do that but my point is that is -- I have
19 experienced that myself, and the point here is if anything goes
20 because we're in a critical situation, then I --

21 THE COURT: Now, I totally disagree with that
22 assertion. We are not in an anything goes environment. We are
23 in an environment in which we're seeking to fit the exceptional
24 case within the standard framework that we're all familiar with
25 of due process, Bankruptcy Code, bankruptcy rules, the local

1 rules and accepted practice in this court.

2 And the only thing that's really different here is
3 that to not approve this facility doesn't just mean that the
4 hypothetical Friday payroll for the big Chapter 11 debtor is
5 not paid; it means that market participants everywhere,
6 globally, are materially adversely affected. I consider that
7 to be an exceptional circumstance and one in which it may not
8 be good practice to be worrying too much about whether the
9 facility itself is richly priced. It is the only facility.
10 And I am not going to convert this hearing into a public
11 renegotiation of the fee letter.

12 MR. DESPINS: Okay. Got it. You've heard me.
13 That's all I can say.

14 THE COURT: And you've heard me.

15 MR. DESPINS: Thank you.

16 MS. FIFE: With that, Your Honor, I'd ask you to
17 approve the interim financing.

18 THE COURT: Now, let me ask, because we have still a
19 reasonably packed courtroom, whether there are any objections
20 other than the ones that I've just heard and dealt with, I
21 think, to the approval of this facility, including issues with
22 respect to the proposed interim financing order or any other
23 aspect of this transaction, because I am not, just because it's
24 late and just because this transaction is critically important,
25 attempting to cut off anybody's ability to be heard.

1 MR. RIVERA: If I may, Your Honor, just very briefly,
2 Andrew Velez-Rivera for the United States Trustee. We have
3 less than a half a dozen relatively minor changes, and those
4 have been accepted by both the debtors and Barclays. So we're
5 taking care --

6 THE COURT: Very good. Glad to hear that. Mr.
7 Mason?

8 MR. MASON: Yes, Your Honor. Again, Richard Mason,
9 Wachtell, Lipton, Rosen & Katz for JPMorgan Chase Bank. Not
10 objecting to the interim financing. I'd just like to get a
11 clarification on the record. As Your Honor remembers and we
12 talked about previously, JPMorgan, pursuant to an order Your
13 Honor entered yesterday, has been making advances to the
14 broker-dealer secured by liens, securing a guaranty,
15 effectively, of the holding company. And I just want it to be
16 clear that those continuing advances, under that order, do not
17 constitute a violation of the DIP credit agreement. And, as I
18 think Ms. Fife had referred to before, the DIP lender is not
19 seeking a lien, priority, pari passu or subordinate, on our
20 collateral.

21 There are a couple of provisions that I think
22 technically could be read for that proposition. I just want
23 the record to be clear that's not the case.

24 THE COURT: Okay. Let's see if we can confirm that
25 right now.

1 MS. SCHWEITZER: Your Honor, Lisa Schweitzer from
2 Clearly Gottlieb. It was our understanding that we are not
3 priming anyone and that the collateral we were accepting was
4 the membership interest of Neuberger. So, just to be clear, I
5 don't understand JPMorgan to have a lien on that that we would
6 be priming. And so we were being represented that we were
7 doing a first-priority lien on that asset, but nothing else.

8 MR. MASON: That's correct. We don't have a lien on
9 that. And I just want to make sure that you don't have a
10 primings, pari passu or subordinate lien on our collateral.
11 You only have --

12 MS. SCHWEITZER: That's correct, Your Honor. So
13 we're all in agreement.

14 THE COURT: That's all been confirmed. Is everybody
15 happy now?

16 MR. MASON: Very, Your Honor.

17 THE COURT: Is there anyone else who wishes to be
18 heard with reference to the proposed interim DIP facility? I
19 have a question. There's a reference to a budget. I didn't
20 see it.

21 MS. FIFE: Sorry, Your Honor. It was being worked on
22 late last night, but I can provide you with it. One moment.

23 THE COURT: And my understanding is that advances
24 under the interim facility will be limited to 200 million
25 dollars but will be made in accordance with the budget.

1 MS. FIFE: That's correct, Your Honor.

2 MR. DESPINS: Your Honor, may we inquire because we
3 haven't seen the --

4 THE COURT: You absolutely should.

5 MR. DESPINS: The question is whether the maximum 200
6 will be available under the budget.

7 MS. FIFE: Will it be available under the budget?

8 MR. DESPINS: Yeah, the full 200 million available
9 under the budget.

10 MS. FIFE: Yes.

11 MR. DESPINS: Okay.

12 MS. FIFE: May I approach --

13 THE COURT: You may.

14 MS. FIFE: -- Your Honor?

15 THE COURT: Thank you.

16 MS. SCHWEITZER: This is, Your Honor, a proposed
17 budget, I believe, that has been discussed and with the
18 borrower -- I mean, with the lender. But I am now being that
19 the attorneys for the lender have not seen it, so if they want
20 to reserve that right to --

21 MS. FIFE: Right. I apologize. Right, I think we're
22 all on the same page, that we intend to have the debtor lend
23 against a budget. Just because of the standard negotiations,
24 we were given rough budgets but we hadn't finally signed off on
25 this particular budget. Maybe we've seen this, maybe we

1 haven't. This is the first time we have been handed this
2 document.

3 THE COURT: I'm really glad I asked this question.
4 It seems awfully important.

5 MS. SCHWEITZER: No, I think that's right. So just
6 to be clear is that the 200 million is available on day one.
7 There's a requirement that the debtor provide a budget and
8 provide cash forecasts and all the routine conditions. The
9 debtor -- we had not -- we have been given a budget, a
10 preliminary budget, to look at. So I think we all have an
11 understanding generally of where the money would be going to.
12 But because of the urgency and the debtor was just still
13 working on the budget that we hadn't finally signed off on the
14 form of the budget. I don't think that there's -- I don't
15 understand of any material disagreements about the terms. I
16 just wanted to note that I can't necessarily say this would be
17 attached to the agreement at this point.

18 MS. FIFE: But, Your Honor, I just confirmed that our
19 businesspeople and Barclays' businesspeople have reviewed that
20 budget several times. It's just that particular piece of
21 paper. So we will finalize it and submit it to Your Honor with
22 the additional changes that need to be made to the order.

23 THE COURT: Okay. I may have some edits to the order
24 before it gets entered. Has everyone who reasonably needs to
25 comment on the form of order had a chance to do that? I'm

1 going to take silence as "I don't know" instead of "yes".

2 MS. GRANFIELD: In terms of trying to conform an
3 order to some of the things that were said on the record
4 earlier, Your Honor, that's your question?

5 THE COURT: Well, actually, I asked a different
6 question, which is whether everybody who reasonably needs to
7 have input as to the form of order has had a chance to do so,
8 because this all happening very fast. And to the extent there
9 is anything who wishes to have input as to the form of order,
10 we're not going to do that while I'm sitting here.

11 MS. FIFE: No, I understand that.

12 THE COURT: But I think that there should be some
13 opportunity for people to meet, confer and wordsmith.

14 MS. FIFE: That's fine, Your Honor. There is one
15 issue though: that I believe we need to borrow tomorrow
16 morning.

17 THE COURT: So let's get it done now --

18 MS. FIFE: That's fine, Your Honor.

19 THE COURT: -- and recognizing that it's twenty to 8,
20 and in order to enter the order on the docket my chamber staff
21 needs to stay here. So it would be helpful, just from a
22 personal perspective, if we could be done within, say, the next
23 forty-five minutes.

24 MS. FIFE: We'll work as fast as we can, Your Honor.

25 THE COURT: I understand that. Now, there are some

1 miscellan -- Mr. Despins?

2 MR. DESPINS: Just briefly, Your Honor. I don't want
3 to beat a dead horse but there are findings in there that
4 there's no other financing available.

5 THE COURT: That's why you're going to have a chance
6 to meet and confer.

7 MR. DESPINS: Okay.

8 THE COURT: If there are aspects of this order that
9 the committee finds objectionable, rather than argue about the
10 language of the order now --

11 MR. DESPINS: Um-hum.

12 THE COURT: -- my suggestion is that you meet and
13 confer here in the courtroom and resolve those differences now
14 so that I can enter an order which at least includes -- you're
15 reserving all your rights, I recognize that, and I'm not
16 holding you to the language that you agreed to, but I'm giving
17 you an opportunity, which you can choose to accept or reject,
18 it's entirely up to you, to be part of the process of
19 developing a form of order.

20 MR. DESPINS: Thank you, Your Honor.

21 THE COURT: And when it comes to findings and
22 conclusions, I will be very careful to limit my findings and
23 conclusions to the record that's been made here.

24 Now, we had a number of miscellaneous matters that
25 were on the agenda as well, entirely, I think, routine and

1 noncontroversial matters, such as joint administration. And
2 Mr. Waisman's here so I guess I gave you the right cue.

3 MR. WAISMAN: Thank you for the cue, Your Honor.
4 Your Honor's correct. There were three other matters on the
5 calendar. We would consider them routine administrative
6 matters. As Your Honor is probably aware, another case was
7 filed last night, the case that Mr. Miller mentioned earlier,
8 LB 745 LLC. The first matter on the calendar would be a motion
9 to jointly administer the two cases for procedural purposes
10 only, not a substantive consolidation in any way. And we would
11 ask that that be approved at this time.

12 THE COURT: I grant that motion.

13 MR. WAISMAN: The next motion on the calendar, Your
14 Honor, because we had a hearing yesterday in the initially
15 filed case and certain orders were entered, we would like those
16 orders to apply to the debtor that subsequently filed last
17 night and an additional motion that was filed in the interim
18 gap period. So it's essentially a motion seeking that the new
19 debtor receive all of the relief that Your Honor granted
20 yesterday and today.

21 THE COURT: It seems to me purely procedural. Is
22 there any disagreement in regard to this? I hear none. I'll
23 grant that.

24 MR. WAISMAN: Thank you, Your Honor. The final
25 matter is a case management procedures motion, becoming fairly

1 in this district and being requested by the bench a great deal.
2 It deals with a number of issues, notices of appearance, master
3 service lists, service, omnibus hearing dates and the like, and
4 has been --

5 THE COURT: Before we get to that --

6 MR. WAISMAN: Yes.

7 THE COURT: -- the committee was just formed. I'd
8 like, before entering that order, to give Mr. Despins and his
9 colleagues an opportunity to check that out, unless he's
10 already done so.

11 MR. DESPINS: No, Your Honor.

12 MR. MILLER: I'm certain, not given Mr. Despins'
13 earlier statements, perhaps if there are no other objections we
14 can confer with the committee and submit it on consent --

15 THE COURT: You can.

16 MR. MILLER: -- later this week. The only other
17 thing, the Office of the United States Trustee has asked that
18 we incorporate the provisions of Rule 9070-1, that they shall
19 receive hard copies of all pleadings, and we will incorporate
20 that into the version that's submitted to Your Honor. And,
21 with that, we conclude the agenda. Thank you, Your Honor.

22 THE COURT: Okay. I want to make clear something
23 that was, I think, left unstated when we were dealing with the
24 sale procedures. In thinking about how to deal in an orderly
25 way with the hearing set for Friday afternoon, we concluded in

1 chambers that that hearing should be at 3:00, unless that
2 messes things up for the debtor or other parties, my concern
3 being that if we start later, given how we did today, it's
4 going to be very difficult for us to reach closure. Does that
5 work for you, Mr. Miller?

6 MR. MILLER: Your Honor, because of the process of
7 closing the transaction and consistent with a manner in which
8 accounts can be transferred and so on, it has been very
9 strongly suggested that the hearing not start till 4:00, Your
10 Honor.

11 THE COURT: Not start till 4:00?

12 MR. MILLER: Yeah.

13 THE COURT: In that case, it will not start till
14 4:00.

15 MR. MILLER: Thank you, Your Honor.

16 THE COURT: And, frankly, I believe that even if I
17 have listed it at 3:00, we would not start until 4:00. Is
18 there anything more for this evening?

19 MR. MILLER: We need to set a date for the hearing.

20 THE COURT: For the final?

21 MR. MILLER: Final.

22 THE COURT: You mean for the final DIP. When's that
23 going to be?

24 MR. WAISMAN: October 10th?

25 MS. SCHWEITZER: No. I think we moved it to the 2nd.

1 October 2nd is -- that's seventeen days out, which is the date
2 we had put in there and penciled. Well, Rosh Hashanah is
3 earlier that week, so it's after the holiday. We just want to
4 make sure that worked for your calendar because we haven't had
5 an opportunity to consult with your calendar.

6 THE COURT: I'm here.

7 MS. SCHWEITZER: Okay. Do you prefer the morning or
8 the afternoon?

9 THE COURT: I have a regular calendar that day, so we
10 better do it in the afternoon. I'd say -- let's do that one at
11 3:00.

12 MS. SCHWEITZER: 3:00.

13 THE COURT: All right?

14 MR. WAISMAN: Your Honor, I believe that concludes
15 the calendar. Thank you very much.

16 THE COURT: Thank you all, and we'll wait around
17 until we hear from you about the DIP.

18 ALL: Thank you, Your Honor.

19 THE COURT: And I am bench-ordering that approved.

20 ALL: Thank you.

21 (Whereupon these proceedings were concluded at 7:48 p.m.)
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23
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25

I N D E X

R U L I N G S

DESCRIPTION	PAGE	LINE
Debtor's bidding procedures package approved	72	18
subject to adjustments according to		
representations made orally on the record		

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.

LISA BAR-LEIB

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Date: September 18, 2008